No. 91-1950-CSX
Status: GRANTED

Title: American Dredging Company, Petitioner
v.
William Robert Miller

Docketed:
May 29, 1992

Court: Supreme Court of Louisiana

Counsel for petitioner: Wagner,Thomas J.

Counsel for respondent: Falcon,Timothy J.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | May 29 1992 | G | Petition for writ of certiorari filed. |
| 2 | Jun 26 1992 | | Brief of respondent William Robert Miller in opposition filed. |
| 3 | Jun 29 1992 | | Brief amicus curiae of Maritime Law Association of the U.S. filed. |
| 4 | Jul 1 1992 | | DISTRIBUTED. September 28, 1992 |
| 5 | Oct 5 1992 | P | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| 6 | Mar 22 1993 | | Brief amicus curiae of United States filed. |
| 7 | Mar 24 1993 | | REDISTRIBUTED. April 16, 1993 |
| 8 | Apr 19 1993 | | Petition GRANTED. |
| | | | ********** |
| 12 | May 8 1993 | | Record filed. |
| | | * | Partial proceedings Supreme Court of Louisiana. |
| 10 | May 24 1993 | | Order extending time to file brief of petitioner on the merits until June 17, 1993. |
| 13 | Jun 1 1993 | | Record filed. |
| | | * | Certified proceedings Civil District Court for the Parish of Orleans. |
| 11 | Jun 3 1993 | | Joint appendix filed. |
| 14 | Jun 17 1993 | | Brief of petitioner filed. |
| 16 | Jun 17 1993 | | Brief amicus curiae of Maritime Law Association of the U.S. filed. |
| 15 | Jun 21 1993 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 17 | Jun 28 1993 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 19 | Jul 12 1993 | | Brief of respondent William Robert Miller, Sr. filed. |
| 18 | Jul 19 1993 | | Brief amicus curiae of United States filed. |
| 20 | Aug 16 1993 | X | Reply brief of petitioner filed. |
| 21 | Sep 8 1993 | | CIRCULATED. |
| 22 | Sep 10 1993 | | SET FOR ARGUMENT TUESDAY, NOVEMBER 9, 1993.(2ND CASE). |
| 23 | Nov 9 1993 | | ARGUED. |

(1)

NO. 91-1950

Supreme Court, U.S.
FILED
MAY 29 1992
OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1991

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**AMERICAN DREDGING COMPANY**
Petitioner

**vs.**

**WILLIAM ROBERT MILLER**
Respondent

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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## QUESTION PRESENTED

The question presented by this petition is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "saving to suitors" clause.

## LIST OF PARTIES

The parties to the action are William Robert Miller and American Dredging Company.

## TABLE OF CONTENTS

PAGE

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 2

JURISDICTIONAL STATEMENT ..... 2

CONSTITUTIONS, STATUTES AND REGULATIONS ..... 2

STATEMENT OF CASE ..... 5

ARGUMENT ..... 8

CONFLICT OF AUTHORITY ..... 8

IMPACT OF THE CONFLICT UPON MARITIME COMMERCE ..... 10

*FORUM NON CONVENIENS* ..... 13

THE *MILLER* DECISION ..... 19

CONCLUSION ..... 23



APPENDIX a ..... A-1

APPENDIX b ..... A-5

APPENDIX c ..... A-10

AFFIDAVIT OF SERVICE ..... A-20

## TABLE OF AUTHORITIES

**Decisions**

PAGE

*Bennett v. Sedco Maritime*,
520 So. 2d 894,
(La. App. 3d Cir. 1987) ..... 22

*Camejo v. Ocean Drilling & Exploration*,
838 F.2d 1374 (5th Cir. 1988) ..... 9, 17, 19

*Canada Malting Co. v. Paterson Steamships S.S. Ltd.*,
285 U.S. 413, 52 S. Ct. 413 (1932) ..... 15-16

*Charter Shipping Co., v. Bowring, Jones & Tidy, Ltd.*,
281 U.S. 515, 50 S. Ct. 400 (1930) ..... 14, 15

*Chick Kam Choo v. Exxon Corp.*,
486 U.S. 140, 108 S. Ct. 1684, (1988) ..... 12

*Chick Kam Choo v. Exxon Corp.*,
699 F.2d 693 (5th Cir. 1983),
*cert. denied*, 464 U.S. 826 (1983) ..... 11

*Chick Kam Choo v. Exxon Corp.*,
764 F.2d 1148 (5th Cir. 1985) ..... 11

*Chick Kam Choo v. Exxon Corp.*,
821 S.W.2d 190 (Tx. App. 14th Dist. 1991) ..... 12

*Cruz v. Maritime Co. of Philippines*,
702 F.2d 47 (2d Cir. 1983) ..... 17, 19

*De Mateos v. Texaco, Inc.*,
562 F.2d 895 (3d Cir. 1977),
*cert. denied*, 435 U.S. 904, 98 S. Ct. 1449 (1978) ..... 18

*Dow Chemical Co. v. Castro Alfaro*,
786 S.W.2d 674 (Tex. 1990),
*cert. denied*, ____ U.S. ____,
111 S. Ct. 671 (1991) ..... 11, 13

*Erie R. Co. v. Tompkins*,
304 U.S. 64, 58 S. Ct. 817 (1938) ..... 21

*Exxon Corp. v. Chick Kam Choo*,
817 F.2d 307 (5th Cir. 1987),
rev'd on other grounds, 486 U.S. 140,
108 S. Ct. 1684 (1988) ..... 9, 12, 17

*Fisher v. The Agios Nicolaos V*,
628 F.2d 308 (5th Cir. 1980),
*cert. denied*, 454 U.S. 816, 102 S. Ct. 92 (1981) ..... 18

*Fitzgerald v. Texaco, Inc.*,
521 F.2d 448 (2d Cir. 1975),
*cert. denied*, 423 U.S. 1052,
96 S. Ct. 781 (1976) ..... 11



*Fox v. Board of Supervisors of
Louisiana State University etc.*,
576 So. 2d 978 (La. 1991) ..... 9

*Garrett v. Moore-McCormack Co.*,
317 U.S. 239, 63 S. Ct. 246 (1942); ..... 22, 23

*Gazis v. John S. Latsis Inc.*,
729 F. Supp. 979 (S.D. N.Y. 1990) ..... 19

*Gonzalez v. Naviera Neptumo A.A.*,
832 F.2d 876 (5th Cir. 1987) ..... 18

*Gulf Oil Corp. v. Gilbert*,
330 U.S. 501, 67 S. Ct. 839 (1947) ..... 14

*Hernandez v. Cali, Inc.*,
32 A.D.2d 192 (N.Y.S. 1969) ..... 18

*Ikospentakis v. Thalassic S.S. Agency*,
915 F.2d 176 (5th Cir. 1990) ..... 9, 10, 11, 17, 19

*In re Air Crash near New Orleans*,
821 F.2d 1147 (5th Cir. 1987) ..... 18, 19

*Kassapas v. Arkon Shipping Agency, Inc.*,
485 So. 2d 565 (La. App. 5th Cir.),
*cert. denied*, 488 So. 2d 203 (La. 1986),
*cert. denied*, 479 U.S. 940, 107 S. Ct.
422 (1986) ..... 11

*Kossick v. United Fruit Co.*,
365 U.S. 765, 81 S.Ct. 886 (1961) ..... 22

*Koster v. (American) Lumbermen's Mut. Casualty Co.*,
330 U.S. 518, 67 S. Ct. 828 (1947) ..... 14

*La Seguridad v. Transytur Line*,
707 F.2d 1304 (11th Cir. 1983) ..... 18

*Lauritzen v. Larsen*,
345 U.S. 571, 73 S. Ct. 921 (1953) ..... 12

*Markzannes v. Bermuda Star Line, Inc.*,
545 So. 2d 537 (La. 1989), *cert. denied*,
*Bermuda Star Line, Inc. vs. Markozannes*,
493 U.S. 1043, 110 S. Ct. 837 (1990) ..... 8, 10

*Mason v. Ship Blaireau*,
6 U.S. (2 Cranch) 240 (C.C.D. Md. 1804) ..... 14

*Miller v. American Dredging Co.*,
580 So. 2d 1091 (La. App. 4th Cir. 1991) ..... 2, 6, 7

*Miller v. American Dredging Co.*,
595 So. 2d 615 (La. 1992) ..... 2, 7, 8, 9, 19, 20

*Missouri ex rel. Southern R. Co. v. Mayfield*,
340 U.S. 1, 71 S. Ct. 1 (1950) ..... 20

*Needham v. Phillips Petroleum Co.*,
719 F.2d 1481 (10th Cir. 1983) ..... 18

*Neely v. Hollywood Marine, Inc.*,
530 So. 2d 1116 (La. 1988),
*cert. denied*, 489 U.S. 1080,
109 S. Ct. 153 (1989) ..... 22



*Offshore Logistics, Inc. v. Tallentire*,
477 U.S. 207, 106 S. Ct. 2485 (1986) ..... 21

*Pain v. United Technologies Corp.*,
637 F.2d 775 (D. C. Cir. 1980) ..... 18

*Pastewka v. Texaco, Inc.*
565 F.2d 851 (3d Cir. 1977) ..... 11, 18

*Piper Aircraft Co. v. Reyno*,
454 U.S. 235, 102 S. Ct. 652 (1981) ..... 13, 16, 18

*Quintero v. Klaveness Ship Lines*,
914 F.2d 717 (5th Cir. 1990). ..... 10

*Sherrill v. Brinkerhoff Maritime Drilling*,
615 F. Supp. 1021 (N.D. Cal. 1985) ..... 18

*Sibaja v. Dow Chemical Co.*,
757 F.2d 1215 (11th Cir. 1985),
*cert. denied*, 474 U.S. 948,
106 S. Ct. 347 (1985) ..... 11

*Symeonides v. Cosmar Compania Naviera, S.A.*,
433 So. 2d 281 (La. App. 1st Cir. 1983),
*cert. denied*, 440 So. 2d 731 (La. 1983),
*cert. denied*, 465 U.S. 1079,
104 S. Ct. 1442 (1984) ..... 11

*Szumlicz v. Norwegian American Line, Inc.*,
698 F.2d 1192 (11th Cir. 1983) ..... 18

*The Belgenland*,
114 U.S. 355, 5 S. Ct. 860 (1885) ..... 14, 15

*The Lottawanna*,
88 U.S. (21 Wall.) 558 (1875) ..... 20

*Vargas v. M/V Mini Lama*,
709 F. Supp. 117 (E.D. La. 1989) ..... 18, 19

*Zipfel v. Halliburton Co.*,
832 F.2d 1477 (9th Cir. 1987),
*cert. denied*, 486 U.S. 1054,
108 S. Ct. 2819 (1988) ..... 10, 19

**Statutes**

PAGE

28 U.S.C.A. § 1257 (West Supp. 1992) ..... 2

28 U.S.C.A. § 1333 (1949) ..... 3, 8

45 U.S.C.A. § 51 (1908 and West Supp. 1992) ..... 20

46 U.S.C.A. § 688 (1920 and West Supp. 1992) ..... 4, 20

Fed.Rules Civ.Proc.Rules
1-86, 28 U.S.C.A. ..... 21

La. Code Civ. Proc. Ann. art. 123 (B)
(West Supp. 1992) ..... 3-4, 20

U.S. Const. art. III, sec. 2, C1.1 ..... 2-3, 8

U.S. Sup. Ct. Rule 10, 28 U.S.C.A. ..... 24



**Treatises**

PAGE

Baer, *Admiralty Law of the Supreme Court*,
§ 17-2, p. 488 (3d ed. 1979) ..... 18

Friedell, *Benedict on Admiralty*,
1 §§ 105, 121, 122 (7th ed. 1991) ..... 8

Gilmore & Black, *The Law of Admiralty*
§ 1-19, pp. 51-52 (2d ed. 1975) ..... 18

Healy & Sharp, *Admiralty Cases & Materials*
Ch. 2, Section F, pp. 157-162 (2d ed. 1986) ..... 18

Schoenbaum, *Admiralty and Maritime Law*,
§§ 5-8, 8-8, 13-9, 20-6, 11,
pp. 189, 270, 477, 478, 639, 651-653 (1987). ..... 18

**IN THE SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1991**

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**AMERICAN DREDGING COMPANY**
Petitioner

vs.

**WILLIAM ROBERT MILLER**
Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

---

Petitioner American Dredging Company respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of the State of Louisiana entered on March 2, 1992.



## OPINIONS BELOW

All opinions below are contained in appendices to this Petition. The opinion of the trial court, the Civil District Court for Orleans Parish in Louisiana, is reproduced in Appendix a, *infra*, p. A-3. Its judgment, dismissing petitioner's exception and maritime defense of *forum non conveniens*, also appears in Appendix a, *infra*, p. A-1. The opinion of the Louisiana Fourth Circuit Court of Appeal, affirming the trial court judgment, is reported at *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991) and is reproduced in Appendix b, *infra*, p. A-5. The Louisiana Supreme Court's opinion, reversing the appellate court and the trial court judgments, is reported at *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). It is reproduced in Appendix c, *infra*, p. A-8.

## JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court (Appendix c, *infra* p. A-10) was entered on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West Supp. 1992).

## CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to

> all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a state and Citizens of another state; between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C.A. § 1333 (1949), commonly known as the "saving to suitors" clause, provides in pertinent part as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Louisiana Code of Civil Procedure Article 123 provides as follows:

A. For the convenience of the parties and witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent



jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.

B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C.A. § 688 or federal maritime law.

## STATEMENT OF CASE

William Robert Miller, Sr., petitioner, is a resident of Mississippi. In August of 1987, he moved to Pennsylvania where he joined the Union of Operating Engineers, Local 25 in Philadelphia, Pennsylvania. Through the union, he was hired by American Dredging Company ("American Dredging") to work aboard the Tug JOHN R in the Delaware River. American Dredging is a Pennsylvania corporation with its principal place of business in Camden, New Jersey, which is located just across the Delaware River from Philadelphia.

This action arises out of an accident allegedly sustained by Mr. Miller aboard the Tug JOHN R amid operations in the Delaware River on December 12, 1987. The Tug JOHN R does not now nor has it ever navigated in Louisiana waters. The situs of the vessel's operations is the Delaware River near Camden, New Jersey, where the vessel can be available for inspection during discovery, if necessary.

Mr. Miller was initially treated at Sacred Heart Medical Center in Chester, Pennsylvania. Subsequently, at the direction of his New York counsel, he was treated at the Hospital for Joint Diseases Orthopedic Institute located in New York City. In February of 1988, Mr. Miller returned to Mississippi where he has been treated by other physicians.

On December 1, 1989, Mr. Miller filed this suit against American Dredging in Louisiana state court, the Civil District Court for the Parish of Orleans. American Dredging filed exceptions, challenging personal jurisdiction and requesting a dismissal pursuant to the doctrine of *forum non conveniens*. On September 21, 1990, the exceptions were heard. On September 25, 1990, District Judge Fedoroff entered his reasons for judgment and expressly concluded as follows:



> It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse [*sic*] sort. Appendix a, *infra*, p. A-4.

Following federal maritime authority, the trial court dismissed the action subject to the right of the claimant to proceed in Pennsylvania.[1]

On October 26, 1990, plaintiff filed a motion for suspensive appeal. On November 8, 1990, the appeal order was signed by Judge Fedoroff. On May 6, 1991, the Louisiana Fourth Circuit Court of Appeals heard argument. In its decision of May 30, 1991, the Fourth Circuit affirmed the decision of the lower court, holding that the dismissal was proper under the admiralty doctrine of *forum non conveniens*. *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991). The appellate court specifically held as follows:

> In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navi-

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[1] The defendant has waived any claim that the suit is time-barred should the plaintiff bring the action in a Pennsylvania court of competent jurisdiction.

> gated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

*Miller*, 580 So. 2d at 1093; Appendix b, *infra*, p. A-8.

On June 28, 1991, Mr. Miller petitioned the Louisiana Supreme Court to review the decision of the Fourth Circuit Court of Appeals. By order dated October 18, 1991, the Louisiana Supreme Court granted the writ to review the decision of the Fourth Circuit. On March 2, 1992, the Louisiana Supreme Court reversed the decision of the trial and appellate courts, declining to apply the doctrine of *forum non conveniens* to the state court action. *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). Relying upon federal diversity cases, the Court concluded that it could apply Louisiana procedural law, which does not recognize *forum non conveniens* dismissals in maritime and Jones Act cases. In particular, the Court stated as follows:

> Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.
>
> In sum, we find that the doctrine of *forum non conveniens* is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's *forum non conveniens* rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/general maritime case on the ground of *forum non conveniens*, the lower courts erred in holding otherwise.

*Miller*, 595 So. 2d at 619; Appendix c, *infra*, p. A-19.



American Dredging respectfully presents this petition for a writ of certiorari to resolve the conflict concerning the application of this important doctrine to maritime cases filed in state court.

## ARGUMENT

The question presented by this petition is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "saving to suitors" clause.[2] Stated in adversarial terms, is a maritime defendant entitled to a trial in a convenient forum pursuant to this doctrine or may a maritime claimant evade application of this doctrine by filing the action in state court?

### CONFLICT OF AUTHORITY

There is presently a clear-cut conflict of authority in response to this question. In the decision below, the Louisiana Supreme Court held that "the doctrine of *forum non conveniens* is not a substantive feature of maritime law" and refused to apply it to the instant Jones Act/general maritime claim. *Miller*, *supra* at 617; *see also Markzannes v. Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), *cert. denied, Bermuda Star Line, Inc. vs. Markozannes*, 493 U.S. 1043, 110 S. Ct. 837 (1990). In place of this doctrine, the Louisiana Court applied state procedural law

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[2] While the Constitution extends the judicial power of the federal courts to "all Cases of admiralty and maritime jurisdiction, the Judiciary Act of 1789 recognized the concurrent jurisdiction of state courts over certain maritime matters. U.S. Const. art. III, sec. 2, C1.1; Friedell, *Benedict on Admiralty* 1 §§ 105, 121, 122 (7th ed. 1991). "The district courts shall have original jurisdiction, exclusive of the courts of the States, of [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. § 1333 (1949).

which prohibits *forum non conveniens* dismissals of Jones Act and federal maritime claims.[3]

In direct conflict with the Louisiana procedural rule, the United States Court of Appeals for the Fifth Circuit has repeatedly recognized that "*forum non conveniens* is 'a characteristic feature' of maritime law," which state and federal courts are bound to apply in maritime cases. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd on other grounds, 486 U.S.140, 108 S. Ct. 1684 (1988). In *Ikospentakis*, the Fifth Circuit even declined to permit a voluntary dismissal of a Jones Act federal suit because, to permit same, would have unfairly prejudiced the defendant to state court litigation without safeguarding the defendant's right to a trial in a convenient forum:

> There is some irony in our conclusion. Our court has previously determined that a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d at 307

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[3] *Miller, supra* at 617 - 619. To be precise, the Court reaffirmed its jurisprudence that Louisiana courts may not dismiss on grounds of *forum non conveniens* except as provided by statute. *Fox v. Board of Supervisors of Louisiana State University etc.*, 576 So. 2d 978 (La. 1991). Since Louisiana's statute is expressly inapplicable to Jones Act and maritime cases, the Court declined to dismiss the case even though the trial court (Civil District Court) had concluded that it was "patent that the Civil District Court [was] not a convenient forum," and that "[s]election of [the Civil District Court], having absolutely no connection with the case, [was] forum shopping of the worse (sic) sort." Appendix a, *infra*, p. A-3.



(decision reversed on other grounds). We endorse that holding again. Louisiana courts have definitely refused to recognize this ruling. *Markzannes*, 545 So. 2d at 537. If there were any ambiguity in Louisiana's law, we would be inclined to enforce *Chick Kam Choo* rigorously and hold that there was no "plain legal prejudice" suffered by these appellants, because Louisiana courts must recognize the preemptive force of the federal *forum non conveniens* doctrine in this seaman's case. At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous rule would blink at reality and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result."

*Ikospentakis*, 915 F.2d at 180; accord *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990).

## IMPACT OF THE CONFLICT UPON MARITIME COMMERCE

Petitioner respectfully prays that the Supreme Court resolve this important question. This conflict promotes multiple litigation and vexatious forum selection. Without resolution of this conflict by this Court, maritime claimants dissatisfied with this maritime doctrine will increasingly "shop" for friendlier fora with procedural or other laws which ignore this maritime doctrine. Some claimants initiate litigation in federal court and, after an adverse ruling by federal court, file subsequent actions or activate dormant state court actions. *See, e.g., Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Zipfel v.*

*Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Ikospentakis*, *supra* at 177. *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir.), *cert. denied*, 488 So. 2d 203 (La. 1986) *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So. 2d 281 (La. App. 1st Cir. 1983), *cert. denied*, 440 So. 2d 731 (La. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). *cf. Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976); *see also*: *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) and *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 671 (1991) (reflecting the practice of multiple filings in non-marine cases). The arduous trek of the *Choo* litigation through the federal and state courts amply underscores the need for resolution of this conflict.[4]

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[4] In March, 1978, Chick Kam Choo, a Singapore resident, filed a maritime civil action in federal court in Houston. In the federal action, Choo asserted claims under the Jones Act, the Death on the High Seas Act, the general maritime law and the Texas wrongful death statutes. On July 31, 1980, the federal court dismissed the suit under the maritime doctrine of *forum non conveniens*. Choo failed to appeal timely, but sought to have the federal court's judgment set aside. Relief was denied and the denial was affirmed by the Fifth Circuit Court of Appeals. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983). In January 1984, Choo filed a Texas state court action which was removed to federal court on the basis of diversity. Remand was denied by the federal trial court, but the denial was reversed by the Fifth Circuit because complete diversity was lacking. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985). Subsequently, Exxon filed an independent action in federal



In absence of uniform recognition of this maritime doctrine, the current practice of multiple adjudications and extensive forum shopping will continue even in the face of explicit adverse federal judgments. It is difficult to conceive of a greater impediment to maritime commerce than the unfettered exposure of maritime interests to multiple litigation in inconvenient fora without regard to uniform principles of admiralty. In this context, the comments of Justice Jackson regarding choice of law questions in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953), seems particularly appropriate:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international

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[4] (cont'd)

court in Houston, seeking to enjoin the relitigation of this case in state court. In May, 1986, the federal court entered a judgment enjoining Choo from prosecuting any further state action regarding this incident. This injunction was affirmed by the Fifth Circuit on the basis of the preemptive effect of the former federal decision. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987). This Court granted certiorari and reversed on other grounds. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S. Ct. 1684, (1988) (*"Choo III"*). In April 1990, Exxon moved for summary judgment in Texas state court, seeking dismissal under the maritime doctrine of *forum non conveniens*. In May 1990, the trial court granted the Exxon motion and held that the state law of Texas is preempted by federal maritime law and the case should be dismissed on the basis of *forum non conveniens*. This decision was reversed by the Fourteenth Court of Appeals and that reversal is currently being reviewed by the Supreme Court of Texas. *Chick Kam Choo v. Exxon Corp.*, 821 S.W.2d 190 (Tx. App. 14th Dist. 1991).

> carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a nonnational or international maritime law of impressive maturity and universality.

345 U.S. at 581, 73 S. Ct. at 928.

It is submitted that the decision of the Louisiana Supreme Court will perpetuate the present practice of forum shopping and multiple litigation and produce a grave and real impact upon maritime commerce unless the conflict is resolved by this Court.[5]

## *FORUM NON CONVENIENS* IS AN INTEGRAL PART OF ADMIRALTY

The doctrine of *forum non conveniens* is the legal principle which governs the discretionary exercise of jurisdiction in cases where the forum may be inappropriate or inconvenient for effective resolution of the dispute at issue. Where appropriate, the trial court may, in its discretion, dismiss the case subject to protecting the right of the plaintiff to proceed in a suitable forum. In its present form, the doctrine accords deference to the plaintiff's choice of forum while examining various private and public factors which affect the discretionary retention or dismissal of jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981).

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[5] A similar conflict looms on the horizon between this maritime doctrine and Texas procedural law which likewise does not recognize *forum non conveniens*. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 671 (1991).



The modern exposition of the doctrine of *forum non conveniens* was articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947) and *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947). While those cases concerned the doctrine's application in diversity (non-maritime) cases, the underlying principle of *forum non conveniens* - the discretionary exercise of jurisdiction - is deeply rooted in admiralty jurisprudence. See, e.g. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (C.C.D. Md. 1804); *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885); *Charter Shipping Co., v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 50 S. Ct. 400 (1930); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 52 S. Ct. 413 (1932). As noted in Justice Black's dissent to the *Gilbert* decision, the power to decline to exercise jurisdiction relates to "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity . . ." *Gilbert*, 330 U.S. at 513.

As early as 1804, this Court discussed the discretionary jurisdiction of admiralty in a salvage case involving a French ship salved by British vessel and brought into an American port. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (C.C.D. Md. 1804). Since neither side objected to the proceedings, Chief Justice Marshall made the following observation about the jurisdiction of the admiralty court:

> In this case, a preliminary question has been made, by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested except the owners of the cargo of the Firm, are not Americans, a doubt has been suggested, respecting the jurisdiction of the court, and upon a reference to authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of gen-

> eral policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. *On weighing the considerations drawn from public convenience, those in favour of the jurisdiction, appear much to overbalance those against it*, and it is the opinion of this court, that, whatever doubts may exist in a case, where the jurisdiction may be objected to, there ought to be none where the parties assent to it.

*Mason*, 6 U.S. at 264. (Emphasis added.)

In the 1885 decision of *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885), this Court reviewed various elements affecting the exercise of jurisdiction in a case involving a high seas collision between a Norwegian bark and a Belgian steamship. These included such considerations as the nationality of the parties, location of the tort, location of the *res*, convenience of the parties, treaty provisions, choice of law, etc. *Belgenland*, 114 U.S. at 361-368. The Court's approval of the decision to retain jurisdiction recognized the underlying discretion of the admiralty trial court to make this jurisdictional determination. *The Belgenland*, 114 U.S. at 367, 368.

This discretion was again recognized by this Court in the *Charter Shipping* and *Canada Malting* decisions, *supra*. In *Canada Malting*, Justice Brandeis explicitly upheld the discretion of the trial court to decline jurisdiction even though the collision occurred in United States waters and regardless of whether American law would have afforded the claimant a more favorable recovery:

> The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse



> to retain jurisdiction, and that the exercise of its discretion will not be disturbed unless abused. (Citations omitted.)

* * *

First. The contention that the jurisdiction was obligatory rests upon the fact that the collision occurred within the territorial waters of the United States. The argument is that a cause of action arising from a collision occurring on territorial waters of the United States arises out of its laws, since within its territory there can be no other law. (Citations omitted.)

* * *

> We have no occasion to inquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.

*Canada Malting*, 285 U.S. at 414.

This Court has recently reviewed the nature and relative importance of the private factors and public interests considered in the *forum non conveniens* evaluation. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981). These factors concern the availability of a suitable alternative forum to redress the principal claims, the private interests of the parties including deference to the claimant's choice of forum and convenience considerations, such as ease of proof and evidentiary problems, and the public interest of the forum in the dispute in question.

In *Choo, supra*, the Fifth Circuit presented an extensive analysis of the relationship between *forum non conveniens* and state law. *Choo*, 817 F.2d at 316-321. Noting that the underlying Constitutional protection of maritime commerce was effectuated by uniform application of this doctrine and was undermined by the potential application of local law, the Fifth Circuit explicitly upheld the doctrine's application by state courts in admiralty and maritime cases. *Choo*, 817 F.2d at 318-321.

As yet there has been no dispositive ruling on this question by this Court. The decision of this Court in *Choo* upheld the right of the Texas state courts to make an independent *forum non conveniens* determination. The Texas courts were "presumed competent to resolve federal issues." *Choo*, 486 U.S. at 150; 108 S. Ct. at 1691. Arguably, the decision presupposes that the admiralty doctrine of *forum non conveniens* was the applicable discretionary standard which the Texas court was to apply. However, this precise issue was not decided although Justice O'Connor acknowledged, without upholding, the Fifth Circuit's recognition of the preemptive effect of this admiralty doctrine. *Choo*, 486 U.S. at 150, 108 S. Ct. at 1691; *see also* the concurring opinion of Justice White which acknowledged the "substantial" federal interest in uniformity in admiralty and the potential preemptive effect of federal *forum non conveniens* rulings. *Choo*, 486 U.S. at 151; 108 S. Ct. at 1692.

In view of this Court's established jurisprudence, many lower federal courts have frequently recognized this doctrine in maritime personal injury and Jones Act claims. *Ikospentakis v. Thalassic S. S. Agency*, 915 F.2d 176 (5th Cir. 1990), *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *Exxon v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140, 108 S. Ct. 1684 (1988), *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir.



1983); *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S. Ct. 1449 (1978); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D. C. Cir. 1980) (involving claims under the Death on the High Seas Act relating to the helicopter crash into North Sea); *Gonzalez v. Naviera Neptumo A.A.*, 832 F.2d 876 (5th Cir. 1987); *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983); *Vargas v. M/V Mini Lama*, 709 F. Supp. 117 (E.D. La. 1989); *Pastewka v. Texaco, Inc.* 565 F.2d 851 (3d Cir. 1977); *Gazis v. John S. Latsis Inc.*, 729 F. Supp. 979 (S.D. N.Y. 1990); *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985); *cf. Hernandez v. Cali, Inc.*, 32 A.D.2d 192 (N.Y. App. Div. 1969). *Forum non conveniens* has likewise been recognized as a principle of maritime law by the major treatises on admiralty.[6]

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[6] *Benedict, supra*, at § 129, pp. 8.41 - 8.57; Gilmore & Black, *The Law of Admiralty*, §§ 1-19, pp. 51-52 (2d ed. 1975); Baer, *Admiralty Law of the Supreme Court*, § 17-2, p. 488 (3d ed. 1979); Healy & Sharp, *Admiralty Cases & Materials*, Ch. 2, § F, pp. 157-162 (2d ed. 1986); Schoenbaum, *Admiralty and Maritime Law*, §§ 5-8, 8-8, 13-9, 20-6, 11, pp. 189, 270, 477, 478, 639, 651-653 (1987). While recognition of this doctrine has been largely uniform among the circuits, a few courts have suggested that when American law is applicable a dismissal is improper since it would undermine the application of U. S. law. See: *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *Fisher v. The Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816, 102 S. Ct. 92 (1981), overruled by *In re Air Crash near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). However, none of these decisions directly considered the effect of this Court's holding in *Reyno* that the "possibility of the change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Reyno*, 454 U. S. at 247. Following the *Reyno* directive, the Fifth and Second Circuits have recognized the vitality of this doctrine even though its discretionary application might

## THE *MILLER* DECISION

The Louisiana Supreme Court concluded that the doctrine of *forum non conveniens* concerns only the "convenience" of the defendant which did not "rise to a level of a substantial right." *Miller, supra* at 619 (Appendix c, *infra*, p.A-19). This conclusion stands in direct conflict with the widespread recognition of this doctrine in maritime cases, the deeply-rooted relationship of this doctrine to admiralty, and the explicit holdings of the Fifth Circuit in *Ikospentakis*, *Camejo* and *Choo*, *supra*. This conclusion also seems inaccurate in light of this Court's pronouncement in the non-maritime *Reyno* decision:

> Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

*Reyno*, 454 U.S. at 256; 102 S. Ct. at 266.

Eschewing an analysis of admiralty jurisprudence, the Louisiana Court was persuaded to its view by the instructive decisions of federal diversity cases and by consideration of the "so-called 'reverse-*Erie*' doctrine." *Miller, supra* at

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[6] (cont'd)

cause a change in applicable substantive law. *Aircrash*, 821 F.2d at 1163-1164; *Cruz*, 702 F.2d at 48; *Vargas* 709 F. Supp. at 118. See also the excellent analyses of District Judges Schwartzer and Tenney in the *Sherrill* and *Gazis* cases, respectively. *Gazis v. John S. Latsis Inc.*, 729 F. Supp. 979, 986 (S.D. N.Y. 1990); *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021, 1033-1035 (N.D. Cal. 1985). A dismissal for *forum non conveniens* in this case would not affect the applicable law. Jones Act and general maritime law would be applied whether the case is tried in Louisiana or Pennsylvania.



618 (Appendix a, *infra*, p. A-17). Using this approach, the Court inferred that *forum non conveniens* was a matter of federal procedural law inapplicable to maritime actions filed in state court. *Miller, supra* at 618. The Court therefore concluded that Louisiana courts were free to ignore the federal doctrine and apply Louisiana procedural law.[7] Since Louisiana's *forum non conveniens* law was not applicable to federal maritime cases[8], there was no basis for a dismissal based on convenience.

*Forum non conveniens* is, however, not a mere procedural device which becomes inapplicable under a "reverse-*Erie*" analysis. In the first place, there is no mechanical "reverse-

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[7] Louisiana Code of Civil Procedure Article 123(C). The Louisiana Court relied upon this Court's decision in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), but *Mayfield* is inapposite to the case at bar. Therein, this Court held in a claim under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq* (FELA), that the Missouri state court was free to "decide the availability of the principle of *forum non conveniens* according to its own local law." *Mayfield, supra* at 3. While it is true that the Jones Act, incorporates the FELA liability standards, FELA does not thereby supplant the underlying uniform principles of admiralty. It would be ludicrous to suppose that by adopting a liability standard applicable to railroad workers, Congress had unwittingly destroyed the uniformity of admiralty protected by the Constitution. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875). Accordingly, in absence of an express federal pronouncement regarding this doctrine, state courts remain bound to apply the federal *forum non conveniens* law to maritime cases.

[8] Curiously, Louisiana procedural law permits *forum non conveniens* dismissal of other actions arising under federal law (La. Code Civ. Proc. Ann. art. 123 (B) (West Supp. 1992)) but prohibits such dismissal in maritime cases where uniformity of the admiralty rule would normally control.

*Erie*" scale which can be employed to solve such choice of law problems. The reference to "reverse-*Erie*" theory stems from considerations of parallel, though not altogether symmetrical or reciprocal, principles involving the uniformity doctrine of admiralty, the "savings to suitors" clause and the *Erie* doctrine.[9] The uniformity doctrine of admiralty law mandates that its tenets be applied uniformly by all federal and state courts. The "savings to suitors" clause allows maritime claimants access to state courts without infringing upon those uniform principles. The *Erie* doctrine mandates that state substantive principles be applied by federal courts in diversity cases.[10] The "reverse-*Erie*" concept is no doctrine at all, but a handy metaphor to recognize the potential application of federal or state procedure when not in conflict with underlying legal principles.[11]

This metaphor, however, does not permit a mechanical resolution of this dispute by facile reference to concepts of "substance" and "procedure." Legal principles do not always fall neatly into such finite categories. *Forum non conveniens* has been an established feature of admiralty since long before the articulation of the *Erie* doctrine or the enactment of federal procedural rules.[12] Furthermore, such a nominal analysis overlooks the reality that many fundamental principles of admiralty,

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[9] See the discussion of the Fifth Circuit in *Choo*, 817 F.2d at 319.

[10] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

[11] The *Miller* Court's reference to this Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986) seems particularly inapposite. Nothing in *Tallentire* warrants the disavowal of such a deeply-rooted admiralty principle in favor of a local procedural rule.

[12] Fed.Rules Civ.Proc.Rules 1-86, 28 U.S.C.A.



while directly affecting procedure, are nonetheless characteristic features which make admiralty a distinct and unique body of law. For example, maritime law's protection of seamen as wards of the admiralty court finds direct expression in legal rules which govern procedural questions of burden of proof and sufficiency of evidence. See e.g.: *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961). The rules are no less applicable in state court because they impact and conflict with state procedural rules. *Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 1122-1123 (La. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989); *Bennett v. Sedco Maritime*, 520 So. 2d 894, 905 (La. App. 3d Cir. 1987).

In *Garrett, supra*, this Court explicitly upheld the application of the admiralty burden of proof rule and overturned a Pennsylvania Supreme Court decision which held the issue was procedural and therefore controlled by state law. This Court noted that the "deeply rooted" admiralty rule regarding burden of proof was a "part of the very substance of [the seaman's] right and [could] not be considered a mere incident of a form of procedure." *Garrett, supra*, at 252, 253. The language of Justice Black in *Garrett* regarding the interplay of admiralty law and state practice is particularly instructive:

> It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or *in personam* such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. *If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would*

> *actually deny, federal rights* which Congress, by providing alternative remedies, intended to make not less, but more secure. (Emphasis added.)

*Garrett*, 317 U.S. at 245.

*Forum non conveniens*, like many admiralty principles, affects traditional notions of procedure while effectuating the essential protection of maritime law available to all litigants. This doctrine provides appropriate deference to the plaintiff's choice of forum while protecting the maritime defendant from exposure to an unreasonable, vexatious and oppressive forum selection and allowing the public tribunal to consider its interest in the dispute. This important protection of the rights of all maritime litigants should be uniformly applied in state and federal courts.

The application of this doctrine in state court does not mean that state interests are not relevant and may not be considered. The doctrine is, by nature, a discretionary function of the local court and consideration of relevant public and private factors is mandated by the *forum non conveniens* process. Therefore, in cases where the state has significant interest in the dispute, the discretionary balance will undoubtedly weigh in favor of retaining jurisdiction. However, in those cases where there is little or no such interest, the trial court in its discretion may dismiss the litigation subject to guaranteeing the claimant's right to an adjudication in a suitable forum.

## CONCLUSION

The conflict between the maritime doctrine of *forum non conveniens* and Louisiana's procedural law presents an important federal question which, petitioner respectfully submits, warrants resolution by the Supreme Court. The very



essence of maritime commerce mandates that its participants have contact with multiple locations whose courts apply differing laws, jurisprudence and procedures. The uniformity of American admiralty law protects the rights of all maritime parties - plaintiffs and defendants in state and federal court - to an adjudication of disputes in a fashion consistent with the essential characteristics of admiralty. The "saving to suitors" clause allows maritime claimants access to state courts while preserving the application of uniform admiralty principles, including the doctrine of *forum non conveniens* which protects the legitimate interests of all litigants. The decision below undermines that protection and stands in direct conflict with explicit federal authority. Accordingly, petitioner respectfully prays for a writ of certiorari to review the decision pursuant to Supreme Court Rules 10.1(b) and 10.1(c).

Respectfully submitted,

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**APPENDIX a**
**CIVIL DISTRICT COURT**
**FOR THE PARISH OF ORLEANS**
**STATE OF LOUISIANA**

NO. 89-25877 DIVISION "E"

* * * * * * * * * * *

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

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**JUDGMENT**

This matter came on for hearing on September 21, 1990, on the exceptions of American Dredging Company for lack of jurisdiction *in personam* and, alternatively, for dismissal by reason of *forum non conveniens*. The court has considered the briefs and memoranda of counsel, reviewed the authorities cited therein; and after weighing the arguments of counsel, the court entered its Reasons for Judgment on September 25, 1990.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the exception of defendant, American Dredging Company, for lack of jurisdiction *in personam* is denied but that the exception under the doctrine of *forum non conveniens*, is granted, and this matter is dismissed subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania.



New Orleans, Louisiana, this 28th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE, CIVIL DISTRICT COURT

Respectfully submitted,

_____

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CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

**********

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

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**REASONS FOR JUDGMENT**

I am convinced that the appointment of an agent for service of process forecloses any due process argument American Dredging may have had. The question remains whether Louisiana has sought to exercise jurisdiction in cases such as this. Due process does not require it to do so. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). Under the laws pertaining to foreign corporations before the 1968 amendments, it was clear that appointment of an agent did not constitute consent to be sued on causes of action arising outside Louisiana. *Staley-Wynne Oil Corp. v. Loring Oil Co.*, 162 So. 756 (La. 1935). This limitation was probably eliminated in the 1968 amendments. *Smith v. Globe Indemnity Co.*, 243 So. 2d 882 (1st Cir. 1971). It certainly was eliminated by the addition of Paragraph B to R.S. 13:3201. The exception to personal jurisdiction will be overruled.



It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse sort. C.C.P. Art. 124 (C) would if valid prevent transfer of this maritime claim out of state.

In *Markzannis v. Bermuda Starline*, 545 So. 2d 537 (La. 1989) in a per curiam opinion granting a peremptory writ, the Supreme Court held that the limitation of C.C. Art. 123 (C) prevails over a contrary federal rule. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), the Federal Fifth Circuit Court wrote (at p. 324):

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction.

I do not feel bound by a per curiam opinion granting a peremptory writ in the face of a clearly contrary and authoritative pronouncement by a Federal Court of Appeal on an issue of federal law.

Counsel for defendant has been asked to prepare an appropriate order.

NEW ORLEANS, LOUISIANA this 25th day of September, 1990.

/s/ Gerald P. Fedoroff
J U D G E

**APPENDIX b**

WILLIAM R. MILLER, SR. NO. 90-C-2175

VERSUS COURT OF APPEAL

AMERICAN DREDGING COMPANY FOURTH CIRCUIT

STATE OF LOUISIANA

**********

ON APPEAL FROM CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 89-25877, DIVISION "E"
HONORABLE GERALD P. FEDOROFF, JUDGE

**********

The issue in this litigation is whether the federal maritime defense of "forum non conveniens" is applicable to this Jones Act claim filed in the state court.

William R. Miller, plaintiff, is a resident of Mississippi. In August of 1987 he travelled to Pennsylvania seeking employment. He joined the Union of Operating Engineers, Local 25 in Philadelphia. He was hired by American Dredging Company (ADC), a Pennsylvania Corporation to work on the tug "John R". On or about December 12, 1987, while aboard that vessel navigating the Delaware River, Miller was injured. Initially he was treated at the Sacred Heart Medical Center in Chester, Pennsylvania. He received additional treatment at the Hospital for Joint Diseases Orthopedic Institute located in New York. In February, 1988 Miller return to Mississippi where he has been treated by various doctors along the Mississippi Gulf Coast.



ADC's principal office is in Camden, New Jersey. Although ADC is licensed to do business in Louisiana, the tug "John R" has never navigated Louisiana waters.

Miller filed the instant Jones Act and General Maritime Claim in the Civil District Court for the Parish of Orleans. Service was perfected on ADC's registered agent. In response ADC filed exceptions of lack of *in personam* jurisdiction and *forum non conveniens*.

The trial court denied ADC's exception to the jurisdiction but granted the *forum non conveniens* exception. The court dismissed Miller's suit "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." The trial court reasoned that state courts must apply the forum non conveniens rule of the general maritime law in this maritime proceeding instituted in state court. Miller perfects this appeal.

The *forum non conveniens* defense is a characteristic feature of the general maritime law. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 305 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684 (1988), the U.S. Fifth Circuit stated:

> Under the federal uniformity doctrine state courts must apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime defense. *Id.* at 324.

Despite this clear federal jurisprudence, Miller argues that the trial court erred. In support, he cites Code of Civil Procedure Article 123, and our Supreme Court's "per curiam" opinion in *Markzannes v. The Bermuda Star Line*, 545 So. 2d 537 (La. 1989).

In *Markzannes*, this Court, in an unpublished opinion, held that the state district court must apply the *forum non conveniens* rule of general maritime law where a foreign citizen brought an admiralty suit in state court. In a per curiam opinion, our Supreme Court, citing La. C.C. Pro. Art. 123(c), held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."

Code of Civil Procedure Article 123, sections B and C provide as follows:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the



> defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law.

Miller argues that, despite the federal pronouncements to the contrary, we are bound by the *Markzannes* holding and the provisions of Article 123(C).

The Federal Fifth Circuit, in *Ikospentakis, supra*, noted that "a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine." *Id.* at 180, citing *Exxon Corp. v. Chick Kam Choo, supra.* The Court went on to recognize Louisiana's failure to abide by this doctrine and stated that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law." *Id.*

In the instant case, the trial court reasoned that the Supreme Court's per curiam holding in *Markzannes* was not binding, and maintained ADC's exception based on an application of federal law. We agree with this reasoning.

In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a

Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navigated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

Accordingly, we affirm the trial court's judgment.

AFFIRMED.



**APPENDIX c**

***WILLIAM ROBERT MILLER, SR.***

**v.**

***AMERICAN DREDGING COMPANY***

**NO. 91-C-1524**

Supreme Court of Louisiana.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans, State of Louisiana.

MARCUS, Justice

In August 1987, William R. Miller, a Mississippi resident, moved to Pennsylvania and was employed as a seaman by the American Dredging Co. (ADC), a Pennsylvania corporation with its principal place of business in Camden, New Jersey, and with a registered agent for service of process in New Orleans, Louisiana.[1] Miller was injured on the Delaware River while in the course and scope of his employment on the M/V JOHN R., a vessel owned by ADC. He received medical treatment in Pennsylvania and New York, and in February, 1988, returned to Mississippi, where he received additional treatment from physicians in the Mississippi Gulf Coast area. On December 1, 1989,

---

[1] ADC had not done any dredging business in Louisiana since 1983; however, it maintains an agent for service of process in New Orleans in order to preserve its right to bid on Army Corps of Engineers projects.

Miller filed a Jones Act (46 U.S.C. § 688) and general maritime claim pursuant to the "saving to suitors" provision in 28 U.S.C. § 1333[2] against ADC in the Civil District Court for the Parish of Orleans. ADC filed exceptions of lack of jurisdiction in personam and, alternatively, forum non conveniens. The trial court denied the exception of lack of jurisdiction in personam, but granted the exception of forum non conveniens and ordered the matter dismissed "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." Miller appealed. The court of appeal affirmed.[3] Upon Miller's application, we granted certiorari to consider the correctness of that decision.[4]

The sole issue before us is whether a Louisiana

---

[2] 28 U.S.C. § 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* [emphasis added]

[3] 580 So. 2d 1091 (La. App. 4th Cir. 1991).

[4] 587 So. 2d 684 (La. 1991).



court in a Jones Act/general maritime case is required to apply the federal forum non conveniens law.[5]

Forum non conveniens is a doctrine by which a court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The doctrine has been recognized in federal admiralty law since at least 1801. *Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Admiralty*, 35 Cornell L.Q. 12 (1949). The modern form of the doctrine in federal courts originated in 1947 in the *Gilbert* case, and this federal doctrine has been adopted by thirty-two states and the District of Columbia. Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 950 (1990). By contrast, Louisiana courts have refused to apply the common law doctrine of forum non conveniens, finding it "foreign to our jurisprudence." *Trahan v. Phoenix Insurance Co.*, 200 So. 2d 118 (La. App. 1st Cir. 1967).

---

[5] We note at the outset that the facts of the instant case would not present an issue of forum non conveniens for the federal courts, since they could transfer (as opposed to dismiss for forum non conveniens) the case pursuant to 28 U.S.C. § 1404(a):

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Our state courts have no such mechanism to transfer the case out of the state; and their only option is dismissal of the case. Thus, the question before us is one of dismissal for forum non conveniens, not transfer.

After *Trahan*, the legislature enacted article 123 of the Code of Civil Procedure. That article, in its present form, provides:

> **Art. 123.** ***Forum non conveniens.***
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and in the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the



> defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 [the Jones Act] of federal maritime law.
>
> [Emphasis added].

Louisiana courts may not dismiss cases for forum non conveniens except as provided in this article. *Fox v. Board of Supervisors*, 576 So. 2d 978 (La. 1991).

A clear reading of article 123(c) leads to the conclusion that the doctrine of forum non conveniens is specifically made unavailable in a Jones Act or maritime law case. That was the holding of this court in *Markzannes v. Bermuda Star Line*, 545 So. 2d 537 (La. 1989) (per curiam), *cert. denied*, 110 S.Ct. 837 (1990), and the court of appeal in *Kassapas v. Akron Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir. 1986), *writ denied*, 488 So. 2d 203 (La. 1986), *cert. denied*, 479 U.S. 940 (1986). However, the lower courts in the instant case chose not to rely on those precedents, finding instead that the doctrine of forum non conveniens is a "characteristic feature of the general maritime law" governed by federal, rather than state law. In support, the court of appeal cited the federal Fifth Circuit's opinions in *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990), and *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

As a general proposition, a maritime claim brought in state courts is governed by the same principles as govern actions brought in admiralty, i.e., federal maritime law. *Green v. Industrial Helicopters*, 91-C-0859 c/w 91-C-0860 (La. Jan. 21, 1992) (citing *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir. 1981)). However, it is well settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Lavergne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979). Thus, the focus of our inquiry must be whether the doctrine of forum non conveniens is a fundamental feature of admiralty law, such that our contrary state law rule would be preempted.

Although the United States Supreme Court has yet to address the doctrine of forum non conveniens in a Jones Act/admiralty case, we find that the Court has addressed the doctrine in the context of the Federal Employers' Liability Act (FELA). In *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950), the Supreme Court addressed the issue of whether Missouri could apply its forum non conveniens rule in the context of a FELA claim brought in a Missouri state court. In finding that the state rule could apply, the Court stated:

> According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability



> Act is rested on such a general local practice, no federal issue comes into play.
>
> 340 U.S. at 3.

Since the Jones Act is based upon and incorporates by reference the FELA, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), we find this case persuasive in the matter before us.

Likewise, we find it instructive to look to the decisions of the federal courts sitting in diversity actions. Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts in diversity actions must apply state substantive law and federal procedural law. In *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court was faced with the issue of whether to apply the state or federal forum non conveniens law in a diversity action. The court held that a federal court in diversity was required to apply the federal forum non conveniens law:

> We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important that the disruption of uniformity created by applying federal forum non conveniens in diversity cases.
>
> 821 F.2d at 1159.

The Eleventh Circuit reached a similar result in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), finding that forum non conveniens was not a part of the state substantive law for *Erie* purposes:

> The forum non conveniens doctrine is a rule of venue, not a rule of decision . . . In contrast, "rules of decision" are the "substantive" law of the state, the "legal rules [which[ determine the outcome of a litigation." [citation omitted].

757 F.2d at 1219.

Under the so-called "reverse-Erie" doctrine approved by the Court in *Offshore Logistics v. Tallentine*, 477 U.S. 207, 223 (1986), these cases suggest that the forum non conveniens doctrine should not be considered part of the substantive federal admiralty law in a "saving to suitors" case, any more than the doctrine is part of the state substantive law for *Erie* purposes. *See* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. of Mar. L. & Com. 185, 199 (1987). Further, the interests of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal forum non conveniens in diversity cases are equally applicable to the Louisiana's interest (as expressed by our legislature in La. Code Civ. P. art. 123) in applying the state forum non conveniens rule in Jones Act/general maritime cases.

Turning to the facts of the present case, we see nothing which would lead us to believe the application of our state forum non conveniens rule deprives the litigants of a substantive right under the federal maritime law. Clearly, application of our state rule will not be outcome determinative of the case, since the law of the case (Jones Act and general maritime law) will be identical, whether the case is heard in



Louisiana or Pennsylvania.[6] Louisiana has jurisdiction over the case, and Louisiana courts have an interest in the matter, since

---

[6] In theory, forum non conveniens should never be outcome determinative. For example, if federal choice of law principles mandated that Greek law applies to a case, both a Louisiana court and a federal court would apply Greek law, although the federal court would have the option of dismissing the case under forum non conveniens to allow it to be re-filed in Greece. Nonetheless, the law of the case, whether applied by a Louisiana court, a federal court, or a Greek court would be Greek law. In practice, however, a forum non conveniens dismissal can be outcome determinative in one unique situation: where federal choice of law principles determine that American law applies, but where there is no realistic chance that a foreign court would apply American law to the case. Edelman, *Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. of Mar. L. & Com. 517, 530 (1984). The federal circuits have split on whether such a case may ever be dismissed on forum non conveniens. The Ninth, Tenth, and Eleventh Circuits have refused to dismiss cases for forum non conveniens if American law (i.e., the Jones Act), applies. *See Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983). *See also LaSerguridad v. Transytur Line*, 707 F.2d 1304, 13[illegible] (11th Cir. 1983). By contrast, the Second Circuit in *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983), found that the doctrine of forum non conveniens applied to a Jones Act case. The Fifth Circuit initially agreed with the majority view, and held a federal court was required to retain jurisdiction in a Jones Act case. *See Nichol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984). However, in *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 n. 25 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court in a footnote to a non-Jones Act case disapproved its prior line of cases and applied forum non conveniens to Jones Act cases.

By not allowing for any forum non conveniens dismissals, our state law rule avoids ever creating a situation where the dismissal may be outcome determinative. We also note that our state rule is in accord with the majority of the federal circuits.

defendant has done work in the state in the past and maintains an agent for service of process here. Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.

In sum, we find that the doctrine of forum non conveniens is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's forum non conveniens rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/ general maritime case on the ground of forum non conveniens, the lower courts erred in holding otherwise.

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed. The exception of forum non conveniens is overruled. The case is remanded to the district court for further proceedings in accordance with law.



## AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

**BEFORE ME**, the undersigned authority duly commissioned and qualified in the aforesaid state and parish, came and appeared:

**THOMAS J. WAGNER**

who, after being sworn by me, did depose and say: that he is the counsel of record for petitioner American Dredging Company, and that three copies of this Petition were served on respondent William R. Miller, Sr. through his attorney of record delineated below by first-class mail, postage pre-paid on this 28 day of May, 1992.

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SWORN TO AND SUBSCRIBED BEFORE ME
THIS 28th DAY OF MAY, 1992.

A. Cynthia Martin

NOTARY PUBLIC
My commission expires: at death

Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

(2)

No. 91-1950

In The

# Supreme Court of the United States

October Term, 1991

AMERICAN DREDGING COMPANY,

*Petitioner,*

versus

WILLIAM ROBERT MILLER,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## STATEMENT OF ISSUES PRESENTED

Whether, in a Jones Act case, 46 U.S.C.A. § 688, a Louisiana state court may accept or reject the doctrine of forum non conveniens according to its own notions of procedure for all causes of action begun in its courts.

## TABLE OF CONTENTS


Page

STATEMENT OF ISSUES PRESENTED ..... i

STATEMENT OF THE CASE ..... 1

(A) Introduction ..... 1

(B) Statement of Facts ..... 1

(C) Rulings of the Courts Below ..... 3

REASONS FOR DENYING THE WRIT ..... 4

1. This Jones Act Case should not be used to address the issue of whether foreign seamen may sue in state courts which do not apply to the doctrine of *forum non conveniens* ..... 5

2. A state court should be allowed the same administrative independence as the lower federal courts in applying the procedural doctrine of *forum non conveniens* ..... 6

CONCLUSION ..... 10




## TABLE OF AUTHORITIES


Page

CASES

*Albany Insurance v. Anh Thi Kiew*, 927 F. 2d 882 (5th Cir. 1991) ..... 9

*Bermuda Star Line, Inc. v. Markzannes*, 493 U.S. 1043, 110 S. Ct. 837 (1990) ..... 4

*Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 108 S. Ct. 1684 (1988) ..... 7

*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) ..... 7, 8

*Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942) ..... 6

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947) ..... 9

*In Re: Air Crash Disaster near New Orleans, La.*, 821 F. 2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded* 109 S. Ct. 1928 (1988) ..... 7

*Laverne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979) ..... 6

*Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992) ..... 4

*Missouri v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950) ..... 5, 6, 7, 10

*Markzannes v. The Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989) cert. denied ..... 4

*Offshore Logistics, Inc. v. Tallentier*, 477 U.S. 107, 23, 106 S. Ct. 2485, 2494 (1986) ..... 6, 7

*Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109 (1924) ..... 6

## TABLE OF AUTHORITIES

Page

*Romero v. International Terminals Operating Co.*, 358 U.S. 354, 79 S. Ct. 468 ..... 9, 10

*Sibaja v. Dow Chemical Co.*, 747 F. 2d 1215 (1985) ..... 7

STATUTES

L.S.A.-C.C.P. Art. 123(c) ..... 1, 8, 9

46 U.S.C.A. § 688 (The Jones Act) ..... 1, 4, 5

45 U.S.C.A. § 56 (The Federal Employers' Liability Act) ..... 5

28 U.S.C.A. § 1332 ..... 5

28 U.S.C.A. § 1333 ..... 6

TEXTS

*Speck, Forum Non Conveniens and Choice of Law and Admiralty: Time for an Overhaul*, 18 J. of Marl. L. & Comp. 1985 (1987) ..... 8

## STATEMENT OF THE CASE

### A. INTRODUCTION

This action involves an American seaman, William Robert Miller (hereinafter "Miller"), who filed a claim pursuant to the Jones Act, 46 U.S.C.A. Sec. 688 et seq., in a Louisiana state court against American Dredging Company (hereinafter "ADC"), the owner of the American vessel the M/V John R. There is no dispute that American law, more specifically the Jones Act, applies to this case. Miller filed his suit in a court of competent jurisdiction in the State of Louisiana. ADC complains that the cause of action should have been dismissed from the Louisiana court pursuant to the doctrine of *forum non conveniens*.

The Louisiana Supreme Court held that:

(1) The doctrine of *forum non conveniens* was specifically made unavailable by state statute in Jones Act or maritime law cases, and;

(2) Louisiana's *forum non conveniens* rule was not preempted by federal admiralty law. L.S.A.-C.C.P. Art. 123.

### B. STATEMENT OF FACTS

William R. Miller, hereinafter (Miller), was employed by the defendant, American Dredging Company (ADC) in the capacity of a seaman and member of the crew of the M/V JOHN R, a vessel owned by ADC. On or about December 12, 1987, Miller was working in the course and scope of his employment with ADC on the Delaware River, when he was injured aboard their vessel. After being injured, Miller received initial treatment at the

Sacred Heart Medical Center in Chester, Pennsylvania. Mr. Miller was admitted on December 13, 1987 and remained in that medical facility until December 23, 1987. The only other treatment rendered in that area was at the Hospital for Joint Diseases Orthopedic Institute, which is located in New York, New York. This involved two or three examinations. The treatment lasted until sometime in February of 1988.

Shortly after this, Miller returned to Gauthier, Mississippi, which is about 100 miles from New Orleans, where he remains as a resident. For about seven years during the late 1970's and early 1980's, Miller resided in the State of Louisiana and worked for various boat companies out of Louisiana. Prior to leaving to work for ADC, Miller was a resident of the State of Mississippi. This was until August of 1987, when Mr. Miller went to Pennsylvania seeking work through the Union of Operating Engineers, Local 25, whose office is in Philadelphia, Pennsylvania. Miller lived in that area only while he was working as a captain for ADC. Miller is currently a resident of the State of Mississippi.

Since returning in February of 1988, Miller has been primarily treated by Dr. Chris Wiggins, whose office is located in Pascagoula, Mississippi. In addition to Dr. Wiggins, there have been several other consulting physicians in the Mississippi Gulf Coast area who have rendered treatment to Mr. Miller.

ADC, is a Pennsylvania corporation, with its principal place of business in Camden, New Jersey. ADC has a current license to do business in Louisiana. ADC has maintained this license with the Louisiana Secretary of



State since 1959. Today, ADC is still a corporation in good standing with the Louisiana Secretary of State's office. In addition, as admitted by the defendant in their memorandum in support of their exceptions, ADC currently maintains an agent for service of process in New Orleans. This agent is CT Corporation, the agent which was served with Miller's lawsuit on December 19, 1989.

## C. RULINGS OF THE COURTS BELOW

The defendant, American Dredging Corporation, filed two (2) Exceptions in this matter. The first was an exception to the exercise of the Louisiana state court of *in personam* jurisdiction. That exception was denied by Judge Federoff. The next was an exception of *forum non conveniens,* which was granted by Judge Federoff. It is from the granting of that exception that an appeal to the Louisiana Fourth Circuit was taken.

The hearing on the exceptions of American Dredging Company for lack of jurisdiction *in personam,* and alternatively for dismissal by reason of *forum non conveniens,* was held on September 21, 1990. The court entered its reasons for Judgment on September 25, 1990. It was ordered, adjudged and decreed that the exception of defendant, American Dredging Company for lack of jurisdiction *in persoman* be denied; but the exception under the doctrine of *forum non conveniens,* be granted and the matter was dismissed subject to right of plaintiff to pursue the claim in a court of competent jurisdiction in Pennsylvania. This Judgment was signed on September 28, 1990. A Motion for Suspensive Appeal was filed on behalf of the appellant, William R. Miller, Sr., on October

26, 1990. The appeal order was signed by Judge Federoff on November 8, 1990.

The Louisiana Fourth Circuit Court of Appeal upheld the trial court's ruling in its decision of May 30, 1991. The Louisiana Supreme Court reversed the lower court's decision on March 2, 1992 and held that: (1) The doctrine of *forum non conveniens* was specifically made unavailable by State statute in Jones Act at maritime law cases and, (2) Louisiana *forum non conveniens* rule was not preempted by federal admiralty law.

## REASONS FOR DENYING THE WRIT

(1) ADC requests this Court to grant a writ of certiorari based on purported conflict of authority and the impact that conflict will have upon maritime commerce. ADC claims that there is a conflict between the federal application of *forum non conveniens* and maritime law cases and the Louisiana Supreme Court decision in *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992) and also *Markzannes v. The Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989) cert. denied *Bermuda Star Line, Inc. v. Markzannes*, 493 U.S. 1043, 110 S. Ct. 837 (1990), where the Louisiana Supreme Court refused to apply the doctrine of *forum non conveniens* in a Jones Act and maritime claim, respectfully.

The action presently before the Court is not a part of the purported conflict. Miller was an American seaman working on board an American vessel and therefore covered by American law, more specifically the Jones Act, 46 U.S.C.A. Sec. 688. This Court ruled previously that State



courts may accept or reject the doctrine of *forum non conveniens* in a FELA case according to its own notions of procedural policy. This previous ruling of this Court is also applicable to a Jones Act claim because it incorporates the Federal Employers' Liability Act, 45 U.S.C.A. § 56. Therefore, the granting of the writ of certiorari in this case will not resolve the issues presented by ADC.

(2) Further, the states and their courts should be given the same administrative independence in applying or not applying the procedural doctrine of *forum non conveniens* in maritime cases, as is allowed the federal courts which apply the federal notions of *forum non conveniens* in causes of action filed in federal court pursuant to diversity jurisdiction, 28 U.S.C.A. § 1332.

### 1. This American Jones Act case is an inappropriate vehicle to re-examine the application of the doctrine of *forum non conveniens* as it applies to litigation involving foreign parties in an American court.

The only real issue that can be presented by a grant of the writ of certiorari in this matter is whether, in a Jones Act case, 46 U.S.C.A. § 688, a Louisiana state court may accept or reject the doctrine of *forum non conveniens* according to its own notions of procedure for all causes of action begun in its courts. Although this Court has yet to address the doctrine of *forum non conveniens* in a Jones Act/Admiralty case, the Court has addressed the doctrine in the context of the Federal Employers' Liability Act (FELA). In *Missouri v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), this Court addressed the issue whether Missouri

(5)

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OFFICE OF THE CLERK

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# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1992

*AMERICAN DREDGING COMPANY*
**Petitioner,**

**vs.**

*WILLIAM ROBERT MILLER*
**Respondent.**

**On Writ of Certiorari to**
**The Supreme Court of The State of Louisiana**

## JOINT APPENDIX

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**CERTIORARI GRANTED APRIL 19, 1993**

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70 pp

## TABLE OF CONTENTS


PAGE

RELEVANT DOCKET ENTRIES ..... 1

COMPLAINT, FILED DECEMBER 1, 1989 ..... 7

EXCEPTIONS OF LACK OF JURISDICTION *IN PERSONAM* AND, ALTERNATIVELY, *FORUM NON CONVENIENS*, FILED APRIL 25, 1990 ..... 10

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTION OF LACK OF JURISDICTION *IN PERSONAM* AND, ALTERNATIVELY, *FORUM NON CONVENIENS*, FILED JUNE 20, 1990 ..... 31

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EXCEPTION OF LACK OF JURISDICTION *IN PERSONAM* AND *FORUM NON CONVENIENS*, FILED SEPTEMBER 18, 1990 ..... 43

JUDGMENT OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA INCLUDING REASONS FOR JUDGMENT DATED SEPTEMBER 28, 1990 ..... 49

DECISION OF LOUISIANA FOURTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA DATED MAY 30, 1991 ..... 53

DECISION OF LOUISIANA SUPREME COURT DATED MARCH 2, 1992 ..... 58

**RELEVANT DOCKET ENTRIES**

***CIVIL DISTRICT COURT FOR THE***
***PARISH OF ORLEANS***
***STATE OF LOUISIANA***

***No. 89-25877*** ***DIVISION "E"***

***WILLIAM R. MILLER, SR.***
**versus**
***AMERICAN DREDGING COMPANY***

1. Complaint, filed December 1, 1989.

2. Defendant's Exceptions Of Lack Of Jurisdiction *In Personam* And, Alternatively, *Forum Non Conveniens*, filed April 25, 1990.

3. Defendant's Supplemental Memorandum In Support Of Exceptions Of Lack Of Jurisdiction *In Personam* And *Forum Non Conveniens*, filed May 8, 1990.

4. Plaintiff's Memorandum In Opposition To Defendant's Exceptions Of Lack Of Jurisdiction *In Personam* And, Alternatively, *Forum Non Conveniens,* filed June 20, 1990.

5. Defendant's Supplemental Memorandum In Support Of Exceptions Of Lack Of Jurisdiction *In Personam* And *Forum Non Conveniens*, filed September 18, 1990.

6. Reasons For Judgment, dated September 25, 1990.

7. Judgment Denying Exception Of Lack Of Jurisdiction *In Personam*, But Granting The Exception Of *Forum Non Conveniens*, rendered September 28, 1990.

8. Plaintiff's Motion For Suspensive Appeal, filed October 26, 1990.

9. Notice Of Order Granting Suspensive Appeal, entered November 6, 1990.

10. Plaintiff's Motion To Set For Trial On The Merits, filed April 29, 1992.

***COURT OF APPEAL***
***FOURTH CIRCUIT***
***STATE OF LOUISIANA***
***DOCKET NO. 90-CA-2175***

***WILLIAM R. MILLER***
***versus***
***AMERICAN DREDGING COMPANY***

**ON APPEAL FROM**

***CIVIL DISTRICT COURT***
***PARISH OF ORLEANS***
***STATE OF LOUISIANA***
***NO. 89-25877 "E"***
***JUDGE FEDOROFF***

11. Original Brief On Behalf Of William R. Miller, Sr., Plaintiff/Appellant, filed January 18, 1991.

12. Brief On Behalf Of American Dredging Company, Defendant/Appellee, filed February 27, 1991.

13. Oral Argument May 6, 1991.

14. Decision Affirming The Judgment Of The Trial Court, rendered May 30, 1991. (Court Composed of Judges Robert J. Klees, Robert L. Lobrano and Charles R. Ward).



**SUPREME COURT**
**STATE OF LOUISIANA**
**DOCKET NO. 91-C-1524**

**WILLIAM ROBERT MILLER,**
**Plaintiff/Appellant, Petitioner**

**vs.**

***AMERICAN DREDGING COMPANY***
**Defendant/Appellee, Respondent**

***ON WRIT OF REVIEW OF THE COURT OF APPEAL***
***FOURTH CIRCUIT, NO. 90-CA-2175;***
***CIVIL DISTRICT COURT FOR THE***
***PARISH OF ORLEANS***
***HONORABLE GERALD P. FEDOROFF,***
***JUDGE PRESIDING, NO. 89-25877***

15. Plaintiff's Application For A Writ Of Certiorari And For Supervisory Writ And/Or Writs To Review A Judgment Of The Fourth Circuit Court Of Appeal Of The State Of Louisiana, filed June 28, 1991.

16. Respondent's Brief In Opposition To Application For A Writ Of Certiorari And For Supervisory Writs And/Or Writs To Review A Judgment Of The Fourth Circuit Court Of Appeal Of The State Of Louisiana, filed September 10, 1991.

17. Motion Of Louisiana Trial Lawyers Association To File *Amicus Curiae* Brief, filed October 3, 1991. Granted October 3, 1991.

18. Notice Of Interest Of International Shipping Federation And International Chamber Of Shipping And Request To Appear As *Amici Curiae* In Support Of The Judgment Of The Court Of Appeal, filed October 10, 1991. Granted October 11, 1991.

19. Brief Of *Amicus Curiae*, Louisiana Trial Lawyers Association, In Support Of Plaintiff's Application For Certiorari, filed October 14, 1991.

20. Order Granting Plaintiff's Application For A Writ Of Certiorari And/Or Review, signed October 18, 1991.

21. Original Brief On The Merits Filed On Behalf Of William Robert Miller, Sr., Plaintiff/Appellant/Petitioner, filed November 22, 1991.

22. Brief Of *Amici Curiae*, International Shipping Federation And International Chamber Of Shipping In Support Of The Decision Of The Court Of Appeal, Fourth Circuit, filed December 13, 1991.

23. Brief Of *Amicus Curiae*, Maritime Law Association Of The United States In Support Of Respondent, And Order Granting Motion To File Same, filed December 23, 1991. Granted December 23, 1991.

24. Original Brief On The Merits On Behalf Of American Dredging Company, Defendant/Appellee/Respondent, filed December 23, 1991.

25. Motion To Allow Counsel For *Amici Curiae*, International Shipping Federation And International Chamber Of Shipping To Share Respondent's Oral Argument Time, filed January 7, 1992. Granted January 8, 1992.



26. Oral Argument January 21, 1992.

27. Opinion And Decree Reversing The Judgment Of The Court Of Appeal, rendered March 2, 1992.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

**COMPLAINT**

NOW INTO COURT, through undersigned counsel, comes the Complainant, WILLIAM R. MILLER, SR., a competent major and citizen of the United States, and respectfully shows:

I

This is an admiralty and maritime claim being brought pursuant to Section 33 of the Merchant Marine Act, more commonly known as the Jones Act (46 U.S.C. Section 688), the General Maritime Law for unseaworthiness and for wages, maintenance and cure.

II

At all times hereinafter mentioned, the defendant, AMERICAN DREDGING COMPANY, owned, operated, manned, managed, provisioned and/or controlled and/or had possession of the M/V JOHN R.

III

At all times hereinafter mentioned, complainant was



employed by the defendant in the capacity of a seaman and member of the crew of the M/V JOHN R.

IV

On December 12, 1987, complainant, while in the course of his employment and while in the performance of his duties, because of the unsafe and unseaworthy condition of the aforesaid M/V JOHN R, its gear, appurtenances, crew and unsafe working conditions, and because of the negligence of the defendants and/or their agents and/or employees, was caused to sustain severe injuries to his back, neck or other parts of his body.

V

The proximate cause of complainant's injuries was the negligence of the defendants and/or their employees and/or agents.

VI

Complainant has suffered the following non-exclusive damages for which he is entitled to compensation that is reasonable in the premises:

a) Past, present and future pain and suffering;

b) Past, present and future emotional distress and mental anxiety;

c) Past, present and future lost wages;

d) Past, present and future maintenance, cure and wages;

VII

Further, complainant is entitled to punitive damages and attorney fees for the defendant's wanton and callous refusal to pay maintenance, cure and wages.

VIII

Complainant is entitled to and hereby requests a trial by jury of all issues asserted herein.

WHEREFORE, plaintiff prays that after due proceedings are had, there be judgment herein in his favor and against the defendant, AMERICAN DREDGING COMPANY, in such amount as is reasonable in the premises, with legal interest thereon from date of judicial demand and all costs of these proceedings.

STEGEMAN & FALCON

/s/ Timothy J. Falcon
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* * *

**[Service Instructions Omitted in Printing]**

* * *



CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED: _____
DEPUTY CLERK

**EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND, ALTERNATIVELY, FORUM NON CONVENIENS**

NOW INTO COURT, through undersigned counsel, comes defendant, American Dredging Company, and excepts to this Court's jurisdiction in personam and, alternatively, to the exercise of its jurisdiction on the basis of forum non conveniens for the reasons cited in the attached memorandum.

/s/ N. Eleanor Graham
Thomas J. Wagner (13143)
N. Eleanor Graham (16946)
336 Camp Street
Suite 250, C & R Building
New Orleans, Louisiana 70130-2804
Telephone: (504) 424-2141
and
WAGNER & BAGOT
Attorneys for Defendant, American Dredging Company

**CERTIFICATE OF SERVICE**

I, the undersigned authority, hereby certify that I have this date forwarded a copy of the above and foregoing pleading to all counsel of record this 25th day of April, 1990.

/s/ N. Eleanor Graham



CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED:_____ _____
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**MEMORANDUM IN SUPPORT OF EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND FORUM NON CONVENIENS**

MAY IT PLEASE THE COURT:

**FACTUAL SUMMARY**

Plaintiff, William Robert Miller, Sr., brought this action against his employer, American Dredging Company ("ADC"), pursuant to the Jones Act, 46 U.S.C. § 688, and the general maritime law. The accident giving rise to this action allegedly occurred on December 12, 1987 while plaintiff was aboard the Tug JOHN R in the Delaware River off Marcus Hook, Pennsylvania. See plaintiff's petition.

At the time of the alleged accident plaintiff was a Delaware resident. Upon information and belief plaintiff is a Mississippi resident.

ADC is a Pennsylvania corporation that specializes in dredging water bodies. It has no office or corporate representative in Louisiana. ADC has no property or bank accounts in Louisiana. It has not done any dredging business in Louisiana since 1983. Although ADC has a registered agent for service of process in New Orleans, ADC did not engage this agent in order to subject itself to suits by nonresidents of Louisiana as a result of actions entirely unrelated to Louisiana. The sole purpose of ADC's Louisiana registered agent is to comply with an Army Corps of Engineers requirement should ADC ever submit a bid on dredging projects in Louisiana. Plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana.

All potential fact witnesses to the alleged accident were last known to be residing in the New York area. The majority of plaintiff's medical treatment resulting from the alleged accident occurred near Philadelphia, Pennsylvania and in New York. Accordingly, the vast majority of medical witnesses and records are in Pennsylvania and New York.

The Tug JOHN R, which at all material times was owned and operated by ADC, will be available for inspection in Camden, New Jersey. The Tug JOHN R does not and has never navigated in Louisiana.

Louisiana has no connection to or interest in the action between a Mississippi resident and a Pennsylvania corporation, arising from an alleged accident in the Delaware River.



## II. ARGUMENT

### I. EXCEPTION OF LACK OF JURISDICTION IN PERSONAM

#### A. A FORUM MAY EXERCISE GENERAL IN PERSONAM JURISDICTION OVER A NON-RESIDENT ONLY IF IT HAS "CONTINUOUS AND SYSTEMATIC" CONTACTS WITH THE FORUM.

A Louisiana court's exercise of personal jurisdiction over a nonresident is determined by the Louisiana Long-Arm Statute. La. R.S. 13:3201. The Long-Arm Statute provides in pertinent part:

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (1) Transacting a business in this state.
>
> ...
>
> B. In addition to the provision of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

Louisiana courts have consistently held that the valid application of the Louisiana Long-Arm Statute and exercise of personal jurisdiction over a nonresident require a sufficient nexus between the nonresident and Louisiana so as not to offend federal

due process requirements. See, e.g., American Bank and Trust Company v. Sunbelt Environmental Systems, Inc., 451 So.2d 1111 (La. App. 1st Cir. 1984); Cambre v. St. Paul Fire & Marine Insurance Company, 331 So.2d 585 (La. App. 1st Cir. 1976); Grinnell v. Garrett, 295 So.2d 496 (La. App. 3d Cir. 1974).

It is well settled that the Due Process Clause of the Fourteenth Amendment of the United States Constitution operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant. Pennoyer v. Neff, 95 U.S. 714 (1878). When in personam jurisdiction is asserted over a nonresident corporate defendant, due process requires that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 457, 463, 61 S. Ct. 339, 342 (1940). A state's exercise of personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum is an exercise of "general jurisdiction" over the defendant. See Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 407, 413, 104 S. Ct. 1868, 1972 n. 9 (1984).[1] In order to exercise general jurisdiction over a nonresident corporation, the foreign corporation is not amenable to a state's general in personam jurisdiction unless it has "continuous and systematic" general business contacts with the forum state. Id. at 1872-73; Perkins v. Benguet Consolidated Mining Company, 342 U.S. 437, 72 S. Ct. 413 (1952).

---

[1] The United States Supreme Court now distinguishes two types of personal jurisdiction - "general jurisdiction" and "specific jurisdiction." The exercise of "specific jurisdiction" occurs only when the action arises out of or relates to the defendant's contacts with the forum state. The issue before this court is Louisiana's right to exercise "general jurisdiction" over ADC since plaintiff's action neither arises out of nor is related to ADC's limited contacts with Louisiana.



## B. THE DUE PROCESS CLAUSE MANDATES THAT PLAINTIFF'S ACTION BE DISMISSED.

In the instant case, a Louisiana court is constitutionally prescribed from exercising general in personam jurisdiction over ADC because ADC does not have "continuous and systematic" general business contacts with Louisiana. ADC does not have any office, corporate representative, bank accounts or property in the state of Louisiana. ADC has not done any dredging work in Louisiana since 1983. Id. ADC has maintained a registered agent in Orleans Parish to preserve its right to bid on Army Corps of Engineers projects. However, maintaining one's license to do business in a forum does not amount to the "continuous and systematic" general business contacts required to subject a nonresident corporation to the general in personam jurisdiction of the forum. See Helicopteros and Perkins, supra.

It would clearly offend the constitutional mandate of due process for this Court to exercise general in personam jurisdiction over ADC in this action. Such paucity of contacts between a foreign corporation and a state do not constitutionally support the exercise of in personam jurisdiction by a court in the forum state. See, e.g., Helicopteros, supra (holding that a Texas state court could not assert general in personam jurisdiction over a foreign corporation where that corporation's contacts with Texas were limited to one trip to Texas by the corporation's CEO, the corporation's acceptance of checks drawn on a Texas bank, purchases of helicopters and equipment from Texas manufacturers, and related training trips); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S. Ct. 170 (1923) (holding that purchases and related trips of a small Oklahoma retail store from New York wholesalers were insufficient to warrant the assertion of New York's in personam jurisdiction over the Oklahoma

retailer as it had never established a place of business in New York and never regularly carried on business in New York). The nature and extent of business contacts required by the due process clause to support the exercise of general in personam jurisdiction are best exemplified by Perkins, supra. In Perkins, the Supreme Court found that a Philippine corporation, through its president, had carried on "continuous and systematic" general business contacts with Ohio supporting the exercise of general jurisdiction over the corporation there. Those business contacts included the maintenance of an office in Ohio's directors' meetings in Ohio; two Ohio bank accounts; distributing salary checks in Ohio; and the appointment of an Ohio bank to act as transfer agent. In contrast to the foreign corporation's Ohio forum contacts in Perkins, ADC's contacts with Louisiana are patently insufficient to satisfy due process requirements. Accordingly, plaintiff's action should be dismissed for lack of in personam jurisdiction.

## II. EXCEPTION OF FORUM NON CONVENIENS

### A. THE DOCTRINE OF FORUM NON CONVENIENS IS AN INTEGRAL PART OF THE GENERAL MARITIME LAW THAT MUST BE APPLIED BY LOUISIANA STATE COURTS UNDER THE FEDERAL UNIFORMITY DOCTRINE.

Plaintiff brought this admiralty action pursuant to the 'Savings to Suitors' clause. 28 U.S.C. § 1333(1). Accordingly, maritime law as interpreted by the federal courts applies. See Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 322 (5th Cir. 1987), reversed on other grounds, _____ U.S. _____, 108 S. Ct. 1684 (1988).



Forum non conveniens is a jurisprudentially created maritime doctrine that must be applied by state courts when properly raised as a defense. Id. at 329. The principle of forum non conveniens is simply "[t]hat a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 63 S. Ct. 246, _____ (1942). When state courts entertain in personam maritime causes of action, such as in the case at bar, "the substantive remedies afforded by the State [must] conform to governing maritime standards." Choo at 316; Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S. Ct. 246 (1942); see also Lavergne v. Western Co. of N. Amer., Inc., 371 So.2d 807 (La. 1988); Neely v. Hollywood Marine, Inc., 530 So.2d 1116, 1123 (La. 1988). As a significant defense of maritime litigants and essential feature of the maritime law of the United States forum non conveniens preempts conflicting state law. Choo at 316, 319.

ADC anticipates that plaintiff will contend the maritime doctrine of forum non conveniens is strictly procedural and, pursuant to Louisiana Code of Civil Procedure Article 123, not applicable in a Louisiana state court. See Markzannes [sic] v. Bermuda Star Line, Inc., 545 So.2d 537 (La. 1989), U.S. cert. denied _____ U.S. _____, 110 S. Ct. 837 (1990).[2] In Markzannes, a foreign seaman's action, The Louisiana Supreme Court held that Louisiana procedural law governs all actions brought in Louisiana state courts and that Louisiana Code of Civil Procedure Article 123, which permits dismissal on the grounds of

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[2] In Markozannes the Louisiana Supreme Court reversed the Louisiana Fourth Circuit Court of Appeal which held the maritime doctrine of forum non conveniens must be applied by Louisiana state courts. See the unreported original opinion and opinion on rehearing of the Louisiana Fourth Circuit Court of Appeals attached hereto in globo as Exhibit "B".

forum non conveniens, is inapplicable to actions brought pursuant to the Jones Act or general maritime law. Id.

The Louisiana Supreme Court's decision in Markzannes is clearly erroneous because it disregards the general maritime law and mandate of federal preemption. See generally Choo, 817 F.2d 307. In Choo, the United States Court of Appeals for the Fifth Circuit affirmed a district court's injunction of a state court proceeding, holding that a Texas "open forum" statute is inapplicable in a maritime case. The court reasoned that the Federal Uniformity Doctrine requires state courts to apply the forum non conveniens rule of the general maritime law in any case over which the federal courts would have admiralty jurisdiction. 817 F.2d at 324. In reaching its conclusion, the Fifth Circuit expressly rejected the same "procedural" argument recently adopted by the Louisiana Supreme Court in Markzannes. Id. The United States Supreme Court did not decide the merits of the forum non conveniens argument in Choo but reversed the Fifth Circuit on other grounds. 108 S. Ct. 1684.

This Court should be guided by the federal jurisprudence and not the erroneous reasoning of the Louisiana Supreme Court in Markzannes. Applying the Fifth Circuit's analysis in Choo, Louisiana Code of Civil Procedure Article 123 is inapplicable and preempted by the maritime doctrine of forum non conveniens. Id.

**B. UNDER THE GENERAL MARITIME DOCTRINE OF FORUM NON CONVENIENS, THIS CASE SHOULD BE DISMISSED SUBJECT TO THE RIGHT OF THE PLAINTIFF TO PURSUE HIS CLAIM IN PENNSYLVANIA.**

Since the doctrine of forum non conveniens must be



applied by state court where appropriately raised as a defense, this Court should examine the factors and rationale behind the doctrine to determine whether its application mandates that this case be conditionally dismissed. In determining whether dismissal of a suit based on forum non conveniens is appropriate, trial courts must balance several private and public factors.[3] Id. The private factors include:

1. Ease of access to proof in the chosen form;

2. Availability of compulsory process for tenants of witnesses;

3. Cost of obtaining willing witnesses;

4. The possibility of view of the premises;

The public factors include:

1. The court's administrative difficulties when litigation is piled up in congested centers instead of being handled at its origin;

2. Imposing jury duty on the people of the community which has no relation to litigation, i.e., no strong local interest in litigation. Id.

Balancing the private and public factors, it is obvious that this case should be conditionally dismissed on forum non

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[3] Forum non conveniens issues are now decided in maritime cases in the same manner as non-maritime cases, viz. by using the Gilbert analysis. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 652 (1981); In re air Crash Disaster in New Orleans, La., 821 F.2d 1147 (5th Cir. 1987), cert. denied, __ U.S. __, 108 S. Ct. 2819 (1988).

conveniens grounds, subject to the plaintiff's right to recommence the action in a Pennsylvania court. Louisiana has no connection with this litigation. The accident occurred in Pennsylvania near where the vessel would be available for inspection. Virtually all medical witnesses and records are located in Pennsylvania or New York beyond the subpoena power of this Court. All potential fact witnesses were last known to be in the New York area. Obtaining witnesses' testimony for a trial in Louisiana would be very difficult and would depend to a large extent on the always doubtful willingness of witnesses to give their testimony. Moreover, conducting discovery for depositions and/or perpetuating depositions for trial in this forum would be exorbitantly expensive. By comparison, a Pennsylvania forum would be more convenient and less expensive because of the availability and ease of access to the sources of proof and a Pennsylvania court's power to compel the attendance of unwilling witnesses. Accordingly, all private factors strongly favor a Pennsylvania forum.

The public factors clearly weigh in favor of a Pennsylvania forum also. As this Court is well aware, the Civil District Court of Orleans Parish has an enormous case load manifested by this division's congested case and rule dockets and numerous identical trial settings. The difficulties experienced by this Court and its litigants are enormously multiplied when it entertains suits that have no valid relationship to this state or forum, particularly, as in this case, when neither party is a Louisiana resident and the alleged incident giving rise to the claim occurred thousands of miles away. Clearly, the Civil District Court of Orleans Parish should not be the court of first resort for a nonresident plaintiff who was not injured here or hospitalized here and where none of the witnesses or sources of proof are subject to the court's compulsory process. Common sense and justice dictate that this matter should be conditionally dismissed subject to the plaintiff's right to prosecute in a more interested Pennsylvania forum.



As the Supreme Court stated in Gilbert, jury duty should not be imposed on the people of the community which has no relation to the litigation. 330 U.S. at 508. Given Louisiana's obvious lack of interest and connection to this dispute, Louisianians should not be compelled to adjudicate this case.

## CONCLUSION

ADC does not have contacts with Louisiana sufficient to make it constitutionally amenable to defend plaintiff's action here. Therefore, ADC's exception of lack of in personam jurisdiction should be maintained and plaintiff's action should be dismissed. Alternatively, plaintiff's case should be conditionally dismissed under forum non conveniens grounds. The controlling public and private factors enunciated in Gilbert and Reyno support its dismissal subject to refiling in a Pennsylvania forum.

Respectfully submitted,

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American Dredging Company

* * *

**[Service Instructions Omitted in Printing]**

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CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED: _____ _____
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***[EXHIBIT A To Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens]***

JOHN SPYRIDON MARKZANNES NO. 88-C-2440

VERSUS COURT OF APPEAL

BERMUDA STAR LINE, INC, ET AL FOURTH CIRCUIT
STATE OF LOUISIANA

ON APPLICATION FOR REHEARING

The trial court ruled that since the defendant agreed to accept service of process in Orleans Parish, it was prevented from arguing forum non conveniens. This court reversed the trial court, and remanded the case with the instruction that a forum non conveniens agreement is not waived by waiving jurisdictional arguments. This court on March 20, 1989 ordered the trial court to rule on the merits of the forum non conveniens exception. The plaintiff now seeks a rehearing arguing: 1) This court's



reliance on Exxon Corporation v. Chick Kam Choo, 817 F.2d 305 (Fifth Cir. 1987) was incorrect because that case was overruled and 2) This court misinterpreted C.C.P. 123.

We consider rehearing on this writ under Rule 2-18.7, Uniform rules, Courts of Appeal.

CHICK KAM CHOO

The applicant states Chick Kam Choo, supra, was overruled by the U.S. Supreme Court, __ U.S. __, 108 S.Ct. 1684 (1988). In that opinion the Supreme Court interpreted the Anti-Injunction Act, 28 U.S.C.A. Sec. 2283 and its "relitigation" exception which permits a federal court to issue an injunction "to protect or effectuate its judgments." The U.S. Fifth Circuit in its opinion affirmed a Federal District Court ruling which issued a broad injunction, prohibiting litigation in Texas state court. The plaintiff had originally filed suit in federal court asserting

This is the course respondents must follow with respect to the Singapore law claim. It may be that respondents' reading of the pre-emptive force of federal maritime forum non conveniens determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues. Cf. Pennzoil Co. v. Texaco, Inc., 481 U.S., at ____; Clothing Workers, supra, at 518, 75 S.Ct. at 456-57. Accordingly, insofar as the District Court enjoined the state courts from considering petitioner's Singapore law claim, the injunction

exceeded the restrictions of the Anti-Injunction Act.

Id. at 1691

By so ruling, it appears that the Supreme Court remanded the case to federal District Court for a determination of whether a more narrowly drafted injunction was proper, keeping in mind that the Texas state courts must rule on the forum non conveniens issue. The holding does not reverse the rule of law cited by the Fifth Circuit and relied on by this court, that is, the forum non conveniens rule of the general maritime law controls; inconsistent state law cannot be applied. (overruling Kassapas argued by the plaintiff but declared "wrong" by the Fifth Circuit, 817 F.2d at 324). On the contrary, the opinion supports this court's ruling: the Louisiana district court should make a forum non conveniens determination based on federal maritime law, which determination the state court is presumed competent to resolve.

INTERPRETATION OF C.C.P. ARTICLE 123

The applicant attacks this court's statement that "[A]rt. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law." C.C.P.art.123(C). C.C.P.art.123 (C) provides: "The provisions of Paragraph (B) shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law." Paragraph (B) provides that a suit against a non-resident plaintiff based solely on a federal statute and based on acts or omission occurring outside of Louisiana may be dismissed without prejudice if the forum is shown to be inconvenient. Such a case brought by a resident plaintiff may not be dismissed. As such, paragraph (B) provides state substantive law to be applied in cases asserting federal causes of action. Paragraph (C) "by its own terms" renders that provision inapplicable to cases brought pursuant to the Jones Act and federal maritime



law. The legislature has not "prohibited the application of forum non conveniens in state court" as argued by the defense. It has rendered state forum non conveniens doctrine inapplicable. Federal forum non conveniens doctrine, as noted by the U.S. Fifth Circuit in Chick Kam Choo and this court on the first hearing on this writ application, is applicable.

The plaintiff refers to a recommendation of the Louisiana Civil Law Committee to repeal section (C). Recommendations of that committee do not change articles promulgated by the legislature, which articles this court is bound to follow.

Accordingly our original order of March 20, 1989 remains unchanged.

New Orleans, Louisiana, this 19th day of April, 1989.

/s/ RJK
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ WHB
JUDGE WILLIAM H. BYRNES, III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED:_____ _____
DEPUTY CLERK

***[EXHIBIT B To Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens]***

JOHN SPYRIDON MARKZANNES NO. 88-C-2440

VERSUS COURT OF APPEAL

BERMUDA STAR LINE, INC. ET AL FOURTH CIRCUIT
STATE OF LOUISIANA

IN RE: BERMUDA STAR LINE, INC., ET AL
APPLYING FOR: SUPERVISORY WRITS
DIRECTED TO: HONORABLE REVIUS O. ORTIQUE, JR., JUDGE, CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "H", NO. 88-8624

WRIT GRANTED

Plaintiff, a citizen and resident of Greece, filed suit in Civil District Court against his employer, a Cayman Islands



Corporation, with its base of operations in New Jersey and no office or agent for service of process in Louisiana, and its insurer. The plaintiff sought maintenance and cure and damages for an illness or injury he sustained aboard the S.S. Bermuda Star, a Panamanian vessel, bareboat chartered to and operated by the defendant. The injury occurred while the vessel was on the high seas between Boston and Bermuda. The plaintiff was hospitalized and treated in New York before being repatriated to Greece.

Before filing suit, the plaintiff's counsel announced he intended to have the Bermuda Star seized when it docked in New Orleans to secure jurisdiction here. In response, the defense agreed to accept service here and not to contest personal jurisdiction. The defense then filed an exception of improper venue and a motion to dismiss based on forum non conveniens which were denied. The defendant filed this writ seeking this court's supervisory jurisdiction to review those rulings December 8, 1988. The relator announced at that time it wanted to supplement the record with the transcript of the hearing on the motions. That transcript has not yet been received by this court. However, it appears that the issues can be addressed without the transcript.

STATE LAW OR FEDERAL LAW?

In Exxon Corp v. Chick Kam Choo, 817 F.2d 305, 324 (5th Cir. 1987) the U.S. Fifth Circuit held:

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime case. Accord Couch V.

Chevron International Oil Co., 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.] 1984 writ ref'd, n.r.e.); but cf. Couch v. Chevron International Co., 682 S.W.2d 534 (Texas. 1984); contra Kassapas, 485 So.2d 567.

See also In Re Air Crash Disaster Near New Orleans, La, 821 F.2d 1145 (5th Cir. 1987). The respondent argues the applicability of C.C.P. art. 123, citing Kassapas v. Arkon Shipping Agency, Inc., 485 So. 2d 656 (La. App. 5th Cir. 1986) writ. den. 488 So. 2d 203 U.S. cert. den. 107 S.Ct. 422 (1986) for the proposition that forum non conveniens is a procedural, rather than a substantive, law and that state court must follow its own procedural law. The Kassapas opinion was declared unequivocally "wrong" in Choo. Moreover, C.C.P. art. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law. C.C.P. art. 123(c). Thus, since this is a case brought before state court by a foreign citizen over which federal courts have admiralty jurisdiction, the trial court must apply the forum non conveniens rule of general maritime law. Choo.

DOES WAIVER OF LACK OF PERSONAL JURISDICTION EXCEPTION RENDER INAPPLICABLE FORUM NON CONVENIENS DOCTRINE?

The relator states that the trial court found that the relator could not argue forum non conveniens after agreeing not to contest jurisdiction.

The doctrine of forum non conveniens presupposes that jurisdiction and venue are correct in the suit. Indeed, the doctrine can "never apply if there is absence of jurisdiction or mistake of venue". Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 503, 67 S.Ct. 839, 841 (1947).



As such, consenting to jurisdiction does not prevent a litigant from arguing forum non conveniens. Indeed, the litigant could not argue the doctrine if jurisdiction did not exist.

Accordingly, the judgement of the trial court dated October 24, 1988 dismissing relator's exceptions is hereby reversed. This matter is remanded to the trial court with the directive that a forum non conveniens argument is not waived by waiving jurisdictional arguments. Thus the trial court should bear argument on this issue and rule on the merits of the forum non conveniens exception.

New Orleans, Louisiana, this 20th day of March, 1989.

/s/ RJK
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ William H. Byrnes, III
JUDGE WILLIAM H. BYRNES, III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E" DOCKET NO.

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ _____
DEPUTY CLERK

**MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND, ALTERNATIVELY, FORUM NON CONVENIENS**

MAY IT PLEASE THE COURT:

The defendant, American Dredging Company, (hereinafter ADC) has filed Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens in this matter. The basis of the exception to jurisdiction is that although ADC has contacts with Louisiana, ADC argues that these contacts are not sufficient under the constitutional standards. As to the forum non conveniens argument the defendant clearly points out that Louisiana Law, as well as the Louisiana Supreme Court have ruled that the maritime doctrine of forum non conveniens is not applicable to proceedings in a Louisiana State Court. However, ADC is asking this court to dismiss this action based on a doctrine that is clearly not applicable in this State.



**FACTS**

William R. Miller, hereinafter (Miller), was employed by ADC in the capacity of a seaman and member of the crew of the M/V JOHN R, a vessel owned by ADC. On or about December 12, 1987, Miller was working in the course and scope of his employ for ADC on the Delaware River, when he was injured aboard their vessel. After being injured, Miller received initial treatment at the Sacred Heart Medical Center in Chester, Pennsylvania. Mr. Miller was admitted on December 13, 1987 and remained in that medical facility until December 23, 1987. The only other extensive treatment rendered in that area was at the Hospital for Joint Diseases Orthopedic Institute, which is located in New York, New York. This involved two or three examinations. The treatment lasted until sometime in February of 1988.

Shortly, after this Miller returned to Biloxi, Mississippi where he remains as a resident. For about seven years during the late 1970's and early 1980's, Miller resided in the State of Louisiana and worked for various boat companies. Prior to leaving to work for ADC, Miller was a resident of the State of Mississippi. This was until August of 1987, when Mr. Miller went to Pennsylvania seeking work through the Union of Operating Engineers, Local 25, whose office is in Philadelphia, Pennsylvania. Miller lived in that area only while he was working as a captain for ADC. Miller is currently a resident of the State of Mississippi.

Since returning in February of 1988, Miller has been primarily treated by Dr. Chris Wiggins, whose office is located in Pascagoula, Mississippi. In addition to Dr. Wiggins, there have been several other consulting physicians in the Mississippi Gulf Coast area who have rendered treatment to Mr. Miller.

ADC, which is a Pennsylvania corporation, with its principal place of business in Camden, New Jersey. Therefore, ADC is a foreign corporation but has a current license to do business in Louisiana. ADC has maintained this license with the Louisiana Secretary of State since 1959. Today, ADC is still a corporation in good standing with the Louisiana Secretary of State's office. (See attached Exhibit 1). In addition, as admitted by the defendant's in their memorandum in support of their exceptions, ADC currently maintains an agent for service of process in New Orleans. This agent is CT Corporations, the agent which was served with Miller's lawsuit on December 19, 1989.

ADC has had and is continuously looking for more substantial contacts with the State of Louisiana. The dredging work referred to by the defendants in their memorandum which was completed in 1983, was a job done through the U.S. Army Corps of Engineers in Lake Pontchartrain. The total amount of money that was paid to ADC for this dredging work was around $4,900,000.00. Since that time, ADC has continuously purchased bids specifications and plan proposals from the U.S. Army Corps of Engineers in anticipation of getting further work in the State of Louisiana.

In addition to performing substantial work and deriving substantial revenue from work performed in the State of Louisiana and Orleans Parish, ADC has continuously been involved in different litigation in the United District Court for the Eastern District of Louisiana. The latest such action was a proceeding entitled American Dredging Company v. Pan Ocean Marine, et al. (See attached docket sheet from U.S.D.C. for the E.D.La., Exhibit 2). It should be noted that ADC was the plaintiff in this action and therefore purposely entered the jurisdiction of the State of Louisiana for their own benefit. This action by ADC was commenced after Miller's accident which occurred in December



of 1987. The Eastern District petition was filed on December 6, 1988. As can be noted from Exhibit 2, this was not the first time that ADC was involved in litigation in a Louisiana forum. ADC has been involved in numerous proceedings in the Eastern District of Louisiana as both a party defendant and party plaintiff.

## EXCEPTION OF LACK OF JURISDICTION AND PERSONAM

The Louisiana Supreme Court in Superior Supply Company v. Associated Pipe and Supply Company, 515 So.2d 790 (La. 1987), discusses the Louisiana "Long Arm Statute", L.S.A.-R.S. 13:1301. This case specifically addresses the 1987 amendment to this statute which added Subsection B, which provides:

In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

The court explains that the only inquiry now necessary in order to determine if a Louisiana forum's exercise of jurisdiction over a nonresident is constitutional is whether or not constitutional requirements of due process have been met. Superior Supply, supra at p. 792. Accordingly, the Louisiana Supreme Court reviewed forty years of United States Supreme Court's jurisprudence, starting with International Shoes Co. vs. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Concerning this forty years of jurisprudence, the court states the following:

> The theme that emerges from this series of decisions, rendered over a period of more than forty years and authored by a number of different justices, is that when a nonresident who has purpose-

fully established contacts and relationships with the forum state contests the assertion of personal jurisdiction, the court must analyze the quality and nature of the contacts, the relationship among the defendant, the forum and the litigation, and the evidence presented by the nonresident of facts militating against the exercise of jurisdiction, and must then determine whether the exercise of jurisdiction is reasonable.

In footnote 14 following this sentence, the court states:

> The obvious threshold question is whether any contacts or relationships exist which were the foreseeable result of the nonresident's purposeful conduct. After determining the existence of contacts, the court examines the quality and nature of the contacts and determines whether it is reasonable, in the light of all relative factors, to require the nonresident to defend himself in the forum state.

Using this analysis, it is clear that ADC has purposely established contacts and relationships with the State of Louisiana. The analysis then goes to the following:

1. The quality and nature of the contacts;
2. The relationship among the defendant, the forum and the litigation;
3. The evidence presented by the nonresident of facts militating against the exercise of jurisdiction; and
4. Whether the exercise of jurisdiction is reasonable.



The facts as stated above and which will be introduced at the trial of the exception, will show that by bidding on and being awarded and then performing the dredging contract in Lake Pontchartrain for the United States Army Corps of Engineers, as well as being involved in numerous lawsuits in the United States District Court for the Eastern District of Louisiana, both as plaintiff and defendant; ADC has purposely established contacts and relationships with the State of Louisiana.

The first step of the analysis goes to the quality and nature of those contacts. Obviously, a contract which generates revenues of $4,900,000.00 is one of a very serious nature and high quality. It is anticipated that a representative of the United States Army Corps of Engineers will testify as to how extensive the actual work performed in Lake Pontchartrain was under this contract.

Concerning the established contacts and relationships dealing with the United States District Court forum in Eastern District of Louisiana, it is clear that ADC is very willing to come in and use a Louisiana forum when it is to their benefit. Also, as that Court's docket reflects, ADC has had enough purposeful contacts and relationships with the State of Louisiana to be involved in litigation on over sixteen (16) occasions. These actions were filed between 1976 and 1988, which includes the time when Miller was injured.

The next inquiry goes to the relationship among the defendant, the forum and the litigation. It is agreed that William Miller's cause of action did not arise directly from the defendant's contacts and relationships with this forum. However, Miller, a former resident of the State of Louisiana and a current resident of the State of Mississippi has chosen the Louisiana forum to sue ADC and has effected service of process on ADC's agent, which

is located in Orleans Parish, State of Louisiana. In light of the defendant's willingness to use a Louisiana forum to resolve its disputes whenever it sees fit, why should ADC now protest this Court exercising jurisdiction over this particular proceeding?

The third inquiry goes into the evidence presented by the nonresident of facts militating against the exercise of jurisdiction. ADC in its memorandum in support of its exception has cited the following reasons which they claim will militate against this court exercising jurisdiction:

1. ADC is a Pennsylvania corporation;
2. ADC has no office or corporate representative in Louisiana;
3. ADC has no property or bank accounts in Louisiana;
4. ADC has not done any dredging business in Louisiana since 1983;
5. ADC has a registered agent for service of process in New Orleans only to meet Army Corps of Engineers requirements should ADC ever submit a bid on dredging projects in Louisiana;
6. Plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana;
7. All potential fact witnesses to the alleged accident were last known to be residing in the New York area;
8. The majority of plaintiff's medical treatment resulting from the alleged accident occurred near Philadelphia, Pennsylvania and in New York;
9. The tug JOHN R will be available for inspection in Camden, New Jersey and has never navigated in Louisiana.

The first fact is that ADC is a Pennsylvania corporation.



However, ADC has also been licensed as a corporation in Louisiana since 1959 and is currently a corporation in good standing with the Louisiana Secretary of State. The next two facts cited by the defendant is that ADC has no office or corporate representative in Louisiana and that ADC has no property or bank accounts in Louisiana. In light of the extensive contacts and the substantial revenue derived by ADC's relationships with the State of Louisiana, these two factors seem inconsequential.

The next factor that ADC has cited is that ADC has not done any dredging business in Louisiana since 1983. However, the work that was performed generated $4,900,000.00 worth of work and involved quite an extensive amount of dredging in Lake Pontchartrain. In addition, ADC has purchased bids specifications and plan proposals for additional work to be let out for bid by the U.S. Army Corps of Engineers in the State of Louisiana. In fact, ADC has purchased over twenty-four such bids specifications or plan proposals within the last year. Therefore, ADC is ready and willing, and in fact is just waiting for the right opportunity, to come back to the State of Louisiana and generate additional, substantial revenue.

ADC admittedly has a registered agent for service of process in New Orleans, although they state that this is only to comply with the Army Corps of Engineers requirements, should ADC ever submit a bid on dredging projects in Louisiana. This factor does not militate against, but in fact supports this Court's finding that there is jurisdiction over this corporate defendant. Under the substantial justice and fair play notions of the United States Supreme Court due process standards, one of their requirements is that the nonresident defendant be given proper notice of the proceedings against it. This was discussed in Perkins v. Benquet Mining Co. 342 U.S. 437, 72 S.Ct. 413 (1952). The court stated that because actual notice of the

proceeding was given to the corporation through regular service of summons upon its president while he was in Ohio acting in that capacity, that there was no jurisdictional objection based upon a lack of notice to a responsible representative of the corporation. Perkins, supra at pp. 439, 440. Further at page 445, the court states:

> The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not conclusive test.

Obviously, ADC's relationship with the State of Louisiana is important enough in their mind to have maintained a license to do business in the State of Louisiana since 1959 and to continuously maintain an agent for service of process in the Parish of Orleans.

The next factor cited by ADC to militate against the exercise of jurisdiction is that the plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana. Perkins v. Benquet Mining Co., supra, clearly shows that this factor is not controlling. The Court states:

> This conforms to the realistic reasoning in International Shoe Co. v. Washington, supra at p. 318-319; '...there have been instances in which the continuous corporate operations within a state



were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. (See Missouri K. & T. R. Co. v. Reynolds, 255 U.S. 565; Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915; cf. St. Louis S.W.R. Co. v. Alexander, supra [227 U.S. 218].

'...some of the decisions holding the corporation amenable to suits have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. Lafayette Insurance Co. v. French, 18 How. 404, 407; St. Clair v. Cox, supra [106 U.S. 350], 356; Commercial Mutual Co. v. Davis, supra [213 U.S. 245] 254; Washington Court v. Superior Court., 289 U.S. 361, 364-365. But more realistically it may be said that those authorized acts were in such a nature as to justify the fiction. Smolik v. Philadelphia & Readings Co., 222 F. 148, 151. Henderson, The Position of Foreign Corporations in America Constitutional Law, 94-95.

'...whether due process is satisfied must depend rather upon the quality and nature of the activities in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. C F. Pennoyer v. Neff,

supra [95 U.S. 714]; Minnessota Commercial Assn. v. Benn, 261 U.S. 140; Perkins, supra at pp. 446, 447.

Clearly, Miller's entire claim that this Court should exercise jurisdiction over this corporate defendant is that due process is satisfied because of the quality and nature of ADC's activities in the State of Louisiana. These activities have been quite extensive and have been continuous and systematic. Their system is to review all contracts let out by the Army Corps of Engineers for dredging work in the State of Louisiana and then to systematically choose the one from which they feel they can make substantial revenue.

The next two factors deal with the location of the fact and medical witnesses. These factors may be considered under the forum non conveniens argument which will be discussed below, however, this has no application and is not argued as a militating factor against the exercise of jurisdiction by the defendants. The only other fact listed by the defendants is that the tug JOHN R will be available for inspection in Camden, New Jersey and that the tug does not and has never navigated in Louisiana. This only creates a burden for the plaintiff, not the defendants. A burden which the plaintiff obviously must have considered prior to filing the lawsuit in Orleans Parish. Therefore this fact does not militate against this Court exercising jurisdiction.

The defendants argued in their brief that the due process clause mandates that the plaintiff's action be dismissed. Based on the above and foregoing discussion, especially in light of the substantial contacts that ADC has purposely had with the State of Louisiana, it is clear that the notions of justice and fair play would not be offended by this Court exercising jurisdiction over ADC.



**EXCEPTION OF FORUM NON CONVENIENS**

Although ADC feels that the Louisiana Supreme Court's decision in Markzannes v. Bermuda Starline, Inc., 545 So.2d 537 (La. 1989), cert. denied, _____U.S. _____ 110 S.Ct. 837 (1990)is "clearly erroneous", this is clearly the law for the State of Louisiana. This issue was also decided by the Louisiana 5th Circuit Court of Appeals in Kassapas v. Arkon Shipping Agency, Inc., 485 So.2d 565 (La. App. 5th Cir. 1986). writ. denied. 488 So.2d 203, cert. denied 107 S.Ct. 422, 92 L.Ed. 2d 372. As the 5th Circuit Court of Appeals noted in Kassapas:

> We therefore hold that the trial court erred in conditionally dismissing the case on the ground of forum non conveniens to hold otherwise would, as noted in Trahan v. Phoenix Ins. Co, supra, "constitute judicial legislation of the rankest sort"(at 122). Kassapas, supra at p. 567.

Therefore, again, it is clearly the law in the State of Louisiana that the doctrine of forum non conveniens is inapplicable in a State Court proceeding. As pointed out in Kassapas, this will be the law until the Louisiana legislature decides to change it. Therefore, ADC's exception based on forum non conveniens should be denied.

Respectfully submitted,

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**[Service Instructions & Exhibits Omitted in Printing]**

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CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

WILLIAM R. MILLER, SR.
Versus
AMERICAN DREDGING COMPANY

FILED: _____ _____
DEPUTY CLERK

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND FORUM NON CONVENIENS**

MAY IT PLEASE THE COURT:

Defendant, American Dredging Company ("ADC"), submits this supplemental memorandum in response to plaintiff's allegations.

**EXCEPTION OF LACK OF JURISDICTION IN PERSONAM**

Plaintiff has overstated defendant's contact with the forum state. First, plaintiff claims that defendant uses "a Louisiana forum to resolve its disputes whenever it sees fit" (p.5). Of the sixteen suits referred to by plaintiff, ADC was a defendant in twelve.[4] Clearly, a defendant does not choose the forum or use the forum state. ADC was the plaintiff in only four instances,

[4] After looking into the records of the sixteen aforementioned suits, a common thread among them is apparent. Most were either dismissed in favor of ADC or settled prior to trial.



three of which occurred more than ten years ago, once in 1976, once in 1977 and once in 1979. The most recent case referred to was a Rule 23 interpleader action in which ADC merely requested that the court distribute funds to third parties.

The full facts of this case must be interpreted according to existing law. As cited by the plaintiff on Page 6 of his opposition memorandum, "the obvious threshold question is whether any contacts or relationships exist which were the foreseeable result of the non-resident's purposeful conduct." The first and critical question is the foreseeability of the litigation based on the non-resident's purposeful conduct. ADC's "purposeful" conduct was litigation in which it was primarily named as a defendant. Its only recent "use" of the forum state was to pay money in an interpleader action so that the actual Louisiana litigants could use the Louisiana forum. This dated and sporadic use of the court system in the forum state hardly makes it foreseeable that the present litigation would occur, especially since this suit is based on an accident which occurred on the Delaware River, on a vessel which has never navigated in the forum state, with a plaintiff who is a resident of Mississippi.

The threshold requirement of foreseeability of the litigation is clearly not met. The analysis then turns to the reasonableness of requiring a non-resident to defend in the forum state. The court's inquiry into the reasonableness of the suit is based upon the quality and nature of the conduct. Although, as plaintiff stated, ADC may be ready and willing to do business in the State of Louisiana, the fact is that ADC is not currently doing business in Louisiana. The last work performed by ADC in Louisiana occurred in 1983. This singular event cannot be considered sufficient to meet the standard of "continuous and systematic contacts" as set forth by the Supreme Court in Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 415, 104

S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984).

Plaintiff then points to ADC's registration with the Louisiana Secretary of State as a meaningful contact. This registration alone is not evidence of ongoing activity in Louisiana. It only signifies that ADC is open to the possibility of working with the Corps of Engineers in the future. Again, expressing a desire to do business in Louisiana is not the same thing as doing business. Therefore, plaintiff's suggestion that because ADC would consider future business contacts with the forum state warrants this court's exercise of personal jurisdiction, is incorrect.

As plaintiff cites in Perkins v. Benquet Mining Co., 342 U.S. 437, 72 S. Ct. 413 (1952):

> [T]here have been instances in which the continuous corporate operations within the state were so substantial and of such a nature as to justify suit against it and causes of action arising from dealings entirely distinct from those activities. See Missouri K. Nt. R. Company v. Reynolds, 255 U.S. 565; Tauzea v. Susquehanna Coal Company, 220 N.Y. 259, 115 N.E. 915; cf. St. Louis SWR Company v. Alexander, supra [227 U.S. 218].

Clearly, this quote relied on by plaintiff strengthens defendant's case for lack of personal jurisdiction by the forum state. The court in Perkins explains that if the cause of action and the defendant's contacts with the forum state are unrelated, the contacts must be continuous and substantial. In our case, the cause of action arises from dealings entirely distinct from the defendant's past sporadic activities, and defendant's past contacts with the forum state can in no way be described as continuous or substantial. Therefore, the absence of contacts by ADC mandates, based on the due process clause, that plaintiff's action be dismissed. ADC has not had purposeful contact with the State of Louisiana, therefore, it is clear that the notions of justice and fair play would be offended by this court exercising jurisdiction over ADC.



## EXCEPTION OF FORUM NON CONVENIENS

Forum non conveniens is a jurisprudentially created doctrine which has long been an integral part of the general maritime law. Exxon Corporation v. Chick Kam Choo, 817 F.2d 307, 322 (5th Cir. 1987), rev'd on other grounds, _____ U.S. _____, 108 S. Ct. 1684 (1988). As mentioned by the plaintiff, the defendant still contends that this court should reject the opinion of the Kassapas court. The absence of the state procedural rule regarding dismissal on forum non conveniens grounds should not preclude the application of the doctrine under general maritime law. As the Louisiana Supreme Court stated in Lavergne v. Western Co. of N. Amer., Inc., 371 So. 2d 807, 810 (La. 1979);

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of a substantive maritime law. (Emphasis added.)

To disregard forum non conveniens because of the silence of Louisiana legislature would effectively displace a substantive doctrine of maritime law. See also Symeonides v. Cosmar, 433 So. 2d 281 (La. App. 1st Cir. 1983) (application of forum non

conveniens in state maritime cases recognized). Alleviating forum shopping was a principal reason admiralty courts fashioned the doctrine of forum non conveniens. It represents a traditional response to possible misuse by plaintiffs in selecting their forums. Hence, this court should apply the doctrine of forum non conveniens in accordance with the federal uniformity doctrine and close the open-door policy fostered by Kassapas.

Defendant acknowledges the ruling of the Louisiana Supreme Court in Markozannes which would appear to disallow admiralty doctrines in Jones Act cases heard in state court. We respectfully submit to you now that this court is bound by admiralty principles of forum non conveniens even when in conflict with ruling of the Louisiana state court. See Choo, supra.



## CONCLUSION

ADC does not have contacts with Louisiana sufficient to make it constitutionally amenable to defend plaintiff's action here. Therefore, ADC's exception of lack of in personam jurisdiction should be maintained and plaintiff's action should be dismissed. Alternatively, plaintiff's case should be conditionally dismissed under forum non conveniens grounds. This court is bound by the federal jurisprudence even in face of contrary ruling by superior courts of Louisiana. Applying the Fifth Circuit's analysis in Choo, La. Code Civ. P. art. 123 is applicable and preempted by the longstanding maritime doctrine of forum non conveniens.

Respectfully submitted,

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and

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* * *

**[Service Instructions Omitted in Printing]**

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CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

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WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

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**JUDGMENT**

This matter came on for hearing on September 21, 1990, on the exceptions of American Dredging Company for lack of jurisdiction *in personam* and, alternatively, for dismissal by reason of *forum non conveniens*. The court has considered the briefs and memoranda of counsel, reviewed the authorities cited therein; and after weighing the arguments of counsel, the court entered its Reasons for Judgment on September 25, 1990.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the exception of defendant, American Dredging Company, for lack of jurisdiction *in personam* is denied but that the exception under the doctrine of *forum non conveniens*, is granted, and this matter is dismissed subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania.



New Orleans, Louisiana, this 28th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE, CIVIL DISTRICT COURT

Respectfully submitted,

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Attorneys for American Dredging Company

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

* * * * * * * * * * *

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

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**REASONS FOR JUDGMENT**

I am convinced that the appointment of an agent for service of process forecloses any due process argument American Dredging may have had. The question remains whether Louisiana has sought to exercise jurisdiction in cases such as this. Due process does not require it to do so. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). Under the laws pertaining to foreign corporations before the 1968 amendments, it was clear that appointment of an agent did not constitute consent to be sued on causes of action arising outside Louisiana. *Staley-Wynne Oil Corp. v. Loring Oil Co.*, 162 So. 756 (La. 1935). This limitation was probably eliminated in the 1968 amendments. *Smith v. Globe Indemnity Co.*, 243 So. 2d 882 (1st Cir. 1971). It certainly was eliminated by the addition of Paragraph B to R.S. 13:3201. The exception to personal jurisdiction will be overruled.



It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse sort. C.C.P. Art. 124 (C) would if valid prevent transfer of this maritime claim out of state.

In *Markzannis v. Bermuda Starline*, 545 So. 2d 537 (La. 1989) in a per curiam opinion granting a peremptory writ, the Supreme Court held that the limitation of C.C. Art. 123 (C) prevails over a contrary federal rule. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), the Federal Fifth Circuit Court wrote (at p. 324):

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction.

I do not feel bound by a per curiam opinion granting a peremptory writ in the face of a clearly contrary and authoritative pronouncement by a Federal Court of Appeal on an issue of federal law.

Counsel for defendant has been asked to prepare an appropriate order.

NEW ORLEANS, LOUISIANA this 25th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE

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|---|---|---|
| WILLIAM R. MILLER, SR. | * | NO. 90-C-2175 |
| VERSUS | * | COURT OF APPEAL |
| AMERICAN DREDGING COMPANY | * | FOURTH CIRCUIT<br>STATE OF LOUISIANA |

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ON APPEAL FROM CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 89-25877, DIVISION "E"
HONORABLE GERALD P. FEDOROFF, JUDGE

**********

The issue in this litigation is whether the federal maritime defense of "forum non conveniens" is applicable to this Jones Act claim filed in the state court.

William R. Miller, plaintiff, is a resident of Mississippi. In August of 1987 he travelled to Pennsylvania seeking employment. He joined the Union of Operating Engineers, Local 25 in Philadelphia. He was hired by American Dredging Company (ADC), a Pennsylvania Corporation to work on the tug "John R". On or about December 12, 1987, while aboard that vessel navigating the Delaware River, Miller was injured. Initially he was treated at the Sacred Heart Medical Center in Chester, Pennsylvania. He received additional treatment at the Hospital for Joint Diseases Orthopedic Institute located in New York. In February, 1988 Miller return to Mississippi where he has been treated by various doctors along the Mississippi Gulf Coast.



ADC's principal office is in Camden, New Jersey. Although ADC is licensed to do business in Louisiana, the tug "John R" has never navigated Louisiana waters.

Miller filed the instant Jones Act and General Maritime Claim in the Civil District Court for the Parish of Orleans. Service was perfected on ADC's registered agent. In response ADC filed exceptions of lack of *in personam* jurisdiction and *forum non conveniens*.

The trial court denied ADC's exception to the jurisdiction but granted the *forum non conveniens* exception. The court dismissed Miller's suit "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." The trial court reasoned that state courts must apply the forum non conveniens rule of the general maritime law in this maritime proceeding instituted in state court. Miller perfects this appeal.

The *forum non conveniens* defense is a characteristic feature of the general maritime law. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 305 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684 (1988), the U.S. Fifth Circuit stated:

> Under the federal uniformity doctrine state courts must apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime defense. *Id.* at 324.

Despite this clear federal jurisprudence, Miller argues that the trial court erred. In support, he cites Code of Civil Procedure Article 123, and our Supreme Court's "per curiam" opinion in *Markzannes v. The Bermuda Star Line*, 545 So. 2d 537 (La. 1989).

In *Markzannes*, this Court, in an unpublished opinion, held that the state district court must apply the *forum non conveniens* rule of general maritime law where a foreign citizen brought an admiralty suit in state court. In a per curiam opinion, our Supreme Court, citing La. C.C. Pro. Art. 123(c), held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."

Code of Civil Procedure Article 123, sections B and C provide as follows:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law.

Miller argues that, despite the federal pronouncements to the contrary, we are bound by the *Markzannes* holding and the provisions of Article 123(C).

The Federal Fifth Circuit, in *Ikospentakis, supra*, noted that "a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine." *Id.* at 180, citing *Exxon Corp. v. Chick Kam Choo, supra.* The Court went on to recognize Louisiana's failure to abide by this doctrine and stated that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law." *Id.*

In the instant case, the trial court reasoned that the Supreme Court's per curiam holding in *Markzannes* was not binding, and maintained ADC's exception based on an application of federal law. We agree with this reasoning.

In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree

with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navigated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

Accordingly, we affirm the trial court's judgment.

AFFIRMED.



***WILLIAM ROBERT MILLER, SR.***

**v.**

***AMERICAN DREDGING COMPANY***

**NO. 91-C-1524**

**SUPREME COURT OF LOUISIANA.**

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans, State of Louisiana.

MARCUS, Justice

In August 1987, William R. Miller, a Mississippi resident, moved to Pennsylvania and was employed as a seaman by the American Dredging Co. (ADC), a Pennsylvania corporation with its principal place of business in Camden, New Jersey, and with a registered agent for service of process in New Orleans, Louisiana.[1] Miller was injured on the Delaware River while in the course and scope of his employment on the M/V JOHN R., a vessel owned by ADC. He received medical treatment in Pennsylvania and New York, and in February, 1988, returned to Mississippi, where he received additional treatment from physicians in the Mississippi Gulf Coast area. On December 1, 1989, Miller filed a Jones Act (46 U.S.C. § 688) and general maritime claim pursuant to the "saving to suitors" provision in 28 U.S.C.

---

[1] ADC had not done any dredging business in Louisiana since 1983; however, it maintains an agent for service of process in New Orleans in order to preserve its right to bid on Army Corps of Engineers projects.

§ 1333[2] against ADC in the Civil District Court for the Parish of Orleans. ADC filed exceptions of lack of jurisdiction in personam and, alternatively, forum non conveniens. The trial court denied the exception of lack of jurisdiction in personam, but granted the exception of forum non conveniens and ordered the matter dismissed "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." Miller appealed. The court of appeal affirmed.[3] Upon Miller's application, we granted certiorari to consider the correctness of that decision.[4]

---

[2] 28 U.S.C. § 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. [emphasis added]

[3] 580 So. 2d 1091 (La. App. 4th Cir. 1991).

[4] 587 So. 2d 684 (La. 1991).



The sole issue before us is whether a Louisiana court in a Jones Act/general maritime case is required to apply the federal forum non conveniens law.[5]

Forum non conveniens is a doctrine by which a court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The doctrine has been recognized in federal admiralty law since at least 1801. *Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Admiralty*, 35 Cornell L.Q. 12 (1949). The modern form of the doctrine in federal courts originated in 1947 in the *Gilbert* case, and this federal doctrine has been adopted by thirty-two states and the District of Columbia. Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 950 (1990). By contrast, Louisiana courts have refused to apply the common law doctrine of forum non conveniens, finding it "foreign to our jurisprudence." *Trahan v.*

---

[5] We note at the outset that the facts of the instant case would not present an issue of forum non conveniens for the federal courts, since they could transfer (as opposed to dismiss for forum non conveniens) the case pursuant to 28 U.S.C. § 1404(a):

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Our state courts have no such mechanism to transfer the case out of the state; and their only option is dismissal of the case. Thus, the question before us is one of dismissal for forum non conveniens, not transfer.

*Phoenix Insurance Co.*, 200 So. 2d 118 (La. App. 1st Cir. 1967). After *Trahan*, the legislature enacted article 123 of the Code of Civil Procedure. That article, in its present form, provides:

> **Art. 123. *Forum non conveniens.***
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and in the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 [the Jones Act] of federal maritime law.
>
> [Emphasis added].

Louisiana courts may not dismiss cases for forum non conveniens except as provided in this article. *Fox v. Board of Supervisors*, 576 So. 2d 978 (La. 1991).

A clear reading of article 123(c) leads to the conclusion that the doctrine of forum non conveniens is specifically made unavailable in a Jones Act or maritime law case. That was the holding of this court in *Markzannes v. Bermuda Star Line*, 545 So. 2d 537 (La. 1989) (per curiam), *cert. denied*, 110 S.Ct. 837 (1990), and the court of appeal in *Kassapas v. Akron Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir. 1986), *writ denied*, 488 So. 2d 203 (La. 1986), *cert. denied*, 479 U.S. 940 (1986). However, the lower courts in the instant case chose not to rely on those precedents, finding instead that the doctrine of forum non conveniens is a "characteristic feature of the general maritime law" governed by federal, rather than state law. In support, the court of appeal cited the federal Fifth Circuit's opinions in *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990), and *Exxon Corp. v. Chick Kam Choo*, 817 F.2d

307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

As a general proposition, a maritime claim brought in state courts is governed by the same principles as govern actions brought in admiralty, i.e., federal maritime law. *Green v. Industrial Helicopters*, 91-C-0859 c/w 91-C-0860 (La. Jan. 21, 1992) (citing *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir. 1981)). However, it is well settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Lavergne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979). Thus, the focus of our inquiry must be whether the doctrine of forum non conveniens is a fundamental feature of admiralty law, such that our contrary state law rule would be preempted.

Although the United States Supreme Court has yet to address the doctrine of forum non conveniens in a Jones Act/admiralty case, we find that the Court has addressed the doctrine in the context of the Federal Employers' Liability Act (FELA). In *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950), the Supreme Court addressed the issue of whether Missouri could apply its forum non conveniens rule in the context of a FELA claim brought in a Missouri state court. In finding that the state rule could apply, the Court stated:

> According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability



> Act is rested on such a general local practice, no federal issue comes into play.
>
> 740 U.S. at 3.

Since the Jones Act is based upon and incorporates by reference the FELA, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), we find this case persuasive in the matter before us.

Likewise, we find it instructive to look to the decisions of the federal courts sitting in diversity actions. Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts in diversity actions must apply state substantive law and federal procedural law. In *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court was faced with the issue of whether to apply the state or federal forum non conveniens law in a diversity action. The court held that a federal court in diversity was required to apply the federal forum non conveniens la

> We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important that the disruption of uniformity created by applying federal forum non conveniens in diversity cases.
>
> 821 F.2d at 1159.

The Eleventh Circuit reached a similar result in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), finding that forum non conveniens was not a part of the state substantive law for *Erie* purposes:

> The forum non conveniens doctrine is a rule of venue, not a rule of decision . . . In contrast, "rules of decision" are the "substantive" law of the state, the "legal rules [which[ determine the outcome of a litigation." [citation omitted].
>
> 757 F.2d at 1219.

Under the so-called "reverse-Erie" doctrine approved by the Court in *Offshore Logistics v. Tallentine*, 477 U.S. 207, 223 (1986), these cases suggest that the forum non conveniens doctrine should not be considered part of the substantive federal admiralty law in a "saving to suitors" case, any more than the doctrine is part of the state substantive law for *Erie* purposes. *See* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. of Mar. L. & Com. 185, 199 (1987). Further, the interests of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal forum non conveniens in diversity cases are equally applicable to the Louisiana's interest (as expressed by our legislature in La. Code Civ. P. art. 123) in applying the state forum non conveniens rule in Jones Act/general maritime cases.

Turning to the facts of the present case, we see nothing which would lead us to believe the application of our state forum non conveniens rule deprives the litigants of a substantive right under the federal maritime law. Clearly, application of our state rule will not be outcome determinative of the case, since the law of the case (Jones Act and general maritime law) will be identical, whether the case is heard in Louisiana or Pennsylvania.[6]

---

[6] In theory, forum non conveniens should never be outcome determinative. For example, if federal choice of law principles mandated that Greek law applies to a case, both a Louisiana court and a federal court



Louisiana has jurisdiction over the case, and Louisiana courts have an interest in the matter, since defendant has done work in the state in the past and maintains an agent for service of process here. Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.

In sum, we find that the doctrine of forum non conveniens is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's forum non conveniens rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/general maritime case on the ground of forum non conveniens, the lower courts erred in holding otherwise.

---

would apply Greek law, although the federal court would have the option of dismissing the case under forum non conveniens to allow it to be re-filed in Greece. Nonetheless, the law of the case, whether applied by a Louisiana court, a federal court, or a Greek court would be Greek law. In practice, however, a forum non conveniens dismissal can be outcome determinative in one unique situation: where federal choice of law principles determine that American law applies, but where there is no realistic chance that a foreign court would apply American law to the case. Edelman, Forum Non Conveniens: Its Application in Admiralty Law, 15 J. of Mar. L. & Com. 517, 530 (1984). The federal circuits have split on whether such a case may ever be dismissed on forum non conveniens. The Ninth, Tenth, and Eleventh Circuits have refused to dismiss cases for forum non conveniens if American law (i.e., the Jones Act), applies. *See Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983). *See also LaSerguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983). By contrast, the Second Circuit in *Cruz v. Maritime Co. of*

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed. The exception of forum non conveniens is overruled. The case is remanded to the district court for further proceedings in accordance with law.

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*Philippines*, 702 F.2d 47 (2d Cir. 1983), found that the doctrine of forum non conveniens applied to a Jones Act case. The Fifth Circuit initially agreed with the majority view, and held a federal court was required to retain jurisdiction in a Jones Act case. *See Nichol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984). However, in *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 n. 25 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court in a footnote to a non-Jones Act case disapproved its prior line of cases and applied forum non conveniens to Jones Act cases.

By not allowing for any forum non conveniens dismissals, our state law rule avoids ever creating a situation where the dismissal may be outcome determinative. We also note that our state rule is in accord with the majority of the federal circuits.



**CERTIFICATE OF SERVICE**

I, the undersigned counsel of record for petitioner, American Dredging Company, do hereby certify that three copies of this Joint Appendix were served on respondent, William R. Miller, Sr., through his counsel of record delineated below by placing them in a sealed envelope with postage fully pre-paid in a United States Post Office mail box at New Orleans, Louisiana, addressed as follows:

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All parties required to be served have been served.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of June, 1993.

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Supreme Court, U.S.
FILED
JUN 17 1993
CLERK OF THE COURT

NO. 91-1950

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1992

**AMERICAN DREDGING COMPANY**
Petitioner,

vs.

**WILLIAM ROBERT MILLER**
Respondent.

**On Writ of Certiorari To**
**The Supreme Court of the State of Louisiana**

# BRIEF OF PETITIONER, AMERICAN DREDGING COMPANY

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## QUESTION PRESENTED

The question presented is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "savings to suitors" clause.

## LIST OF PARTIES

The parties to the action are William Robert Miller and American Dredging Company.

## TABLE OF CONTENTS

PAGE


QUESTION PRESENTED ..... i

LIST OF PARTIES ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

Decisions ..... iv

Statutes ..... xi

Treatises and Other Authorities ..... xii

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONS AND STATUTES ..... 2

STATEMENT OF CASE ..... 4

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 8

The General Maritime Law of the United States is Applicable to All Cases of Admiralty Jurisdiction ..... 9




## TABLE OF CONTENTS (continued)

PAGE


The Doctrine of *Forum Non Conveniens* Is an Essential and Characteristic Feature of Admiralty Jurisdiction ..... 13

Application of the Doctrine of *Forum Non Conveniens* May Not Be Defeated By Mere Reference to Substance and Procedure ..... 21

Application of *Forum Non Conveniens* May Not Automatically Be Defeated By Reference to Applicable Law or Citizenship of the Parties ..... 27

CONCLUSION ..... 31

## TABLE OF AUTHORITIES

**Decisions**


PAGE

*Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT*,
654 F.2d 147 (2d Cir. 1980) ..... 30

*Ali v. Offshore Co., Inc.*,
753 F.2d 1327 (5th Cir. 1985) ..... 29

*The Belgenland*,
114 U.S. 355, 5 S. Ct. 860 (1885) ..... 7, 14, 15

*Bennett v. Sedco Maritime*,
520 So. 2d 894 (La. App. 3d Cir. 1987) ..... 26

*Butler v. Boston Steamship Co.*,
130 U.S. 527, 9 S. Ct. 612 (1889) ..... 9, 10

*Camejo v. Ocean Drilling & Exploration*,
838 F.2d 1374 (5th Cir. 1988) ..... 16, 18

*Canada Malting Co. v. Paterson S.S. Ltd.*,
285 U.S. 413, 52 S. Ct. 413 (1932) ..... 7, 14,15.16,28,29

*Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*,
281 U.S. 515, 50 S.Ct. 400 (1930) ..... 14, 15

*Chiazor v. Transworld Drilling Co.*,
648 F.2d 1015 (5th Cir. 1981),
*reh'g denied*, 659 F.2d 1075 (5th Cir. 1981),
*cert. denied*, 455 U.S. 1019, 102 S. Ct. 1714 (1982) ..... 30




## TABLE OF AUTHORITIES (continued)

**Decisions**


PAGE

*Chick Kam Choo v. Exxon Corporation*,
486 U.S. 140, 108 S. Ct. 1684 (1988) ..... 18,19,21

*Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285 (1932) ..... 10

*Cruz v. Maritime Co. of Philippines*,
702 F.2d 47 (2d Cir. 1983) ..... 16, 29

*Dalla v. Atlas Maritime Co.*,
562 F.Supp. 752 (C. D. Cal. 1983),
*aff'd* 771 F.2d 1277 (9th Cir. 1985) ..... 30

*Davis v. Farmers' Co-Op Equity Co.*,
262 U.S. 312, 43 S.Ct. 556 (1923) ..... 23

*De Mateos v. Texaco, Inc.*,
562 F.2d 895 (3d Cir. 1977),
*cert. denied*, 435 U.S. 904, 98 S. Ct. 1449 (1978) ..... 16, 30

*DeLovio v. Boit*,
7 F. Cas. 418 (C.C.D. Mass. 1815) ..... 10, 20,22

*Dow Chemical Co. v. Castro Alfaro*,
786 S.W.2d 674 (Tex. 1990),
*cert. denied*, 498 U.S. 1024, 111 S. Ct. 671 (1991) ..... 21

*Erie R. Co. v. Tompkins*,
304 U.S. 64, 58 S. Ct. 817 (1938) ..... 25

**Decisions**

PAGE

*Exxon v. Chick Kam Choo*,
817 F.2d 307 (5th Cir. 1987)
*reh'g denied, en banc*, 823 F.2d 552 (5th Cir. 1987)
*rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684
(1988) ..... 16, 18,19,25

*Fisher v. The Agios Nicolaos V*,
628 F.2d 308 (5th Cir. 1980),
*reh'g denied*, 636 F.2d 1107 (5th Cir. 1981),
*cert. denied*, 454 U.S. 816, 102 S. Ct. 92 (1981),
*reh'g denied*, 454 U.S. 1129, 102 S. Ct. 982 (1981) .... 17,30

*Fitzgerald v. Texaco, Inc.*,
521 F.2d 448 (2d Cir. 1975),
*cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976) .21,29, 30

*Garrett v. Moore-McCormack Co.*,
317 U.S. 239, 63 S.Ct. 246 (1942) ..... 8, 12, 26,27

*Gazis v. John S. Latsis Inc.*,
729 F. Supp. 979 (S.D.N.Y. 1990) ..... 17, 29

*Gonzalez v. Naviera Neptumo A.A.*,
832 F.2d 876 (5th Cir. 1987) ..... 17

*Green v. Industrial Helicopters, Inc.*,
593 So.2d 634 (La. 1992),
*cert. denied*, 113 S. Ct. 65 (1992) ..... 23

*Gulf Oil Corp. v. Gilbert*,
330 U.S. 501, 67 S. Ct. 839 (1947) ..... 8, 13, 14,23,24,28





**Decisions**

PAGE

*The Harrisburg*
119 U.S. 199, 7 S.Ct. 140 (1886) ..... 11

*Hernandez v. Cali, Inc.*,
32 A.D.2d 192 (1st Dep't 1969),
*aff'd* 265 N.E. 2d 921 (1970) ..... 17

*Ikospentakis v. Thalassic S. S. Agency*,
915 F.2d 176 (5th Cir. 1990) ..... 16,18,19,21

*In re Air Crash near New Orleans*,
821 F.2d 1147 (5th Cir. 1987),
vacated, 490 U.S. 1032, 109 S. Ct. 1928 (1989), later
proceeding 883 F.2d 17 (5th Cir. 1989) ..... 17,29,30

*Kassapas v. Arkon Shipping Agency, Inc.*,
485 So. 2d 565 (La. App. 5th Cir. 1986),
*cert. denied*, 488 So. 2d 203 (La. 1986),
*cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986) ..... 21

*Kemarec v. Compagnie Generale Transatlantique*,
358 U.S. 625, 79 S. Ct. 406 (1959) ..... 11

*Knickerbocker Ice Co. v. Stewart*,
253 U.S. 149, 40 S. Ct. 438 (1920) ..... 12

*Kossick v. United Fruit Co.*,
365 U.S. 731, 81 S. Ct. 886 (1961),
*reh'g denied*, 366 U.S. 941,
81 S. Ct. 1657 (1961) ..... 8, 12, 26

**Decisions**

PAGE

*Koster v. (American) Lumbermen's Mut. Casualty Co.*,
330 U.S. 518, 67 S. Ct. 828 (1947) .....8, 13, 23,24,28,29

*La Seguridad v. Transytur Line*,
707 F.2d 1304 (11th Cir. 1983) .....17,30

*The Lottawanna*,
88 U.S. (21 Wall) 558 (1875) .....7, 8,9, 10,11

*Markozannes v. Bermuda Star Line*,
No. 88-C-2440 (La. App. 4th Cir. March 20, 1989
and April 19, 1989),*rev'd* 545 So.2d 537 (La. 1989),
*cert. denied* 493 U.S. 1043, 110 S. Ct. 837 (1990) .....22

*Markzannes v. Bermuda Star Cruise Line, Inc.*,
545 So.2d 537 (La. 1989),
*cert. denied* 493 U.S. 1043, 110 S.Ct. 837 (1990) ..19,21,22

*Mason v. Ship Blaireau*,
6 U.S. (2 Cranch) 240 (1804) .....7, 14,15

*Miles v. Apex Marine Corp.*,
498 U.S. 19, 111 S. Ct. 317 (1990) .....11

*Miller v. American Dredging Co.*,
580 So. 2d 1091 (La. App. 4th Cir. 1991),
*cert. granted*, 587 So.2d 648 (La. 1991),
*and rev'd*, 595 So.2d 615 (La. 1992),
*cert. granted*, 113 S. Ct. 1840 (1993).....1, 6,22,23,24,25





**Decisions**

PAGE

*Missouri ex rel. Southern R. Co. v. Mayfield*,
340 U.S. 1, 71 S. Ct. 1 (1950) .....23,24

*Moragne v. States Marine Lines, Inc.*,
398 U.S. 375, 90 S.Ct. 1772 (1970) .....11

*Needham v. Phillips Petroleum Co.*,
719 F.2d 1481 (10th Cir. 1983).....17

*Neely v. Hollywood Marine, Inc.*,
530 So. 2d 1116 (La. 1988),
*cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989) .....26

*Offshore Logistics v. Tallentire*,
477 U.S. 207, 106 S. Ct. 2485 (1986) . .....11, 25

*Pain v. United Technologies Corp.*,
637 F.2d 775 (D. C. Cir. 1980),
*cert. denied*, 454 U.S. 1128, 102 S. Ct. 980 (1981) .....17

*Pastewka v. Texaco, Inc.*
565 F.2d 851 (3d Cir. 1977).....17, 21

*Piper Aircraft Co. v. Reyno*,
454 U.S. 235, 102 S. Ct. 252 (1981),
*reh'g denied*, 455 U.S. 928,
102 S. Ct. 1296 (1982) .....7, 8,13, 23,28,29

*The Propeller Genesee Chief v. Fitzhugh*,
53 U.S. (12 How.) 443 (1852).....10

could apply its *forum non conveniens* rule in the context of a FELA claim brought in a Missouri state court. In finding that the state rule could apply, this Court stated:

> According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine of [*forum non conveniens*] for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. 340 U.S. at 3.

Since the Jones Act is based upon and incorporates by reference FELA, this Court's ruling in *Mayfield* should answer the only issue that could possibly be presented by granting of the writ in this case. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 250 (1942).

**2. Louisiana State Court should be allowed administrative independence in applying its own procedural *forum non conveniens* rules in the "reverse-*Erie*" situation as the federal courts are allowed in *Erie* cases.**

States courts hearing maritime cases pursuant to the "savings-to-suitors" clause of 28 U.S.C.A. § 1333 must follow the federal admiralty courts on matters of substantive law but are free to apply their own rules of procedure. *Offshore Logistics v. Tallentier*, 477 U.S. 207 (1986); *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109 (1924); *Laverne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979). This is the black-letter rule for such cases,



and no one disputes it. This system mirrors the constraints imposed by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) on federal courts hearing diversity cases. Consequently, it has come to be known as the "reverse-*Erie*" doctrine. This Court has repeatedly approved the "reverse-*Erie*" concept and label. *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 149, 108 S. Ct. 1684, 1691 (1988); *Offshore Logistics, Inc. v. Tallentier*, 477 U.S. 107, 23, 106 S. Ct. 2485, 2494 (1986).

Under the "reverse-*Erie*" approach state courts are not obliged to follow the *forum non conveniens* practices of federal admiralty courts, because *forum non conveniens* is plainly a matter of procedural law. This Court explicitly held that *forum non conveniens* is procedural, not substantive, in *Missouri v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950).

In *In Re: Air Crash Disaster near New Orleans, La.*, 821 F. 2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded* 109 S. Ct. 1928 (1988), reinstated in pertinent part, 883 F. 2d 17 (5th Cir. 1989), the Court was faced with the issue of whether to apply the state or federal *forum non conveniens* law in a diversity action. The court held that a federal court in diversity was required to apply the federal *forum non conveniens* law:

> We hold that the interest of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases. 821 F. 2d at 1159.

The Eleventh Circuit reached a similar result in *Sibaja v. Dow Chemical Co.*, 757 F. 2d 1215 (1985), in finding that

*forum non conveniens* was not a part of the state substantive law for *Erie* purposes:

> The *forum non conveniens* doctrine is a rule of venue, not a rule of decision. . . . in contrast, "rules of decision" are the "substantive" law of the state, the "legal rule [which] determine the outcome of a litigation". 757 F. 2d at 1219.

Under the so-called "reverse-*Erie*" doctrine approved by this Court, these cases suggest that the *forum non conveniens* doctrine should not be considered part of the substantive federal law in a "savings-to-suitors" case, anymore than the doctrine is part of the state substantive law for *Erie* purposes. See *Speck, Forum Non Conveniens and Choice of Law and Admiralty: Time for an Overhaul*, 18 J. of Marl. L. & Comp. 1985, 1999 (1987). Further, the interest of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal *forum non conveniens* in diversity cases are equally applicable to the state court's interest in applying the state *forum non conveniens* rule in Jones Act-general maritime law cases.

The peculiar nature of *forum non conveniens* makes the "savings-to-suitors" clause equally applicable to state statutes such as Article 123C of the Louisiana Code of Civil Procedure. This clause not only empowers state courts to hear and resolve maritime disputes, but also allows state courts to favor maritime suitors with whatever remedies they so choose. This is vitally important to the concept of Federalism. In this vain, it is noteworthy that this Court has held that general maritime law claims do not "arise" under federal law for the purposes of



removal. See *Romero v. International Terminals Operating Co.*, 358 U.S. 354, 79 S. Ct. 468.

The two most often cited private interest factors in support of a *forum non conveniens* dismissal are the administrative difficulties flowing from court congestion and the unfairness of burdening citizens in an unrelated forum with jury duty. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1947). It is obviously quite different where a state legislature, as the voice of the people, has enacted a statute which specifically abrogates *forum non conveniens* as a defense. In other words, the people of the State of Louisiana, by enactment of Article 123C of the Louisiana Code of Civil Procedure, have explicitly undertaken the additional burdens which may be imposed upon them by having such claims litigated in the courts of the State of Louisiana. Yet, since the people of Louisiana have accepted this additional burden, then Federalism and Comity should prevent the federal judiciary from imposing their contrary will upon the residents of that State. *Albany Insurance v. Anh Thi Kiew*, 927 F. 2d 882 (5th Cir. 1991).

By denying ADC's writ of certiorari to the decision from the Louisiana Supreme Court in this matter, this Court can leave intact the administrative independence of the Louisiana state courts and legislature to apply their procedural rules as they see fit to Jones Act or general maritime law cases that are filed in Louisiana state courts pursuant to the "savings-to-suitors" clause.

———♦———

## CONCLUSION

The application for writs of certiorari of ADC can be dismissed by applying this Court's decision in *Missouri v. Mayfield, supra,* to this matter. The only issue which can truly be addressed by granting writs in this matter is whether or not the States are free to apply their own notions of procedural policy, which includes allowing the State to accept or reject the *forum non conveniens* doctrine for all causes of actions begun in its courts. Because the Jones Act incorporates by specific reference all of the Federal Employers' Liability Act, then *Mayfield* is dispositive of the only issue that can be presented to this Court, as this Court held in *Mayfield* that the State courts are free to accept or reject this doctrine.

Further, by denying the writ of ADC, this Court can leave intact the administrative independence which allows the maritime and Jones Act cases to be brought and litigated in state courts, this will allow these cases to continue to be heard by the non-specialized state court judges, a concept that was so fundamental in Justice Frankfurter's decision in *Romero.* Justice Frankfurter stated:

> The role of the States in the development of maritime law is a role whose significance is rooted in the Judiciary Act of 1789 and the decisions of this Court. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372, 79 S. Ct. 468, 480.



Therefore, William Robert Miller respectfully submits that ADC's writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 91-1950

# In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN DREDGING COMPANY, PETITIONER

*v.*

WILLIAM ROBERT MILLER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether admiralty cases filed in state court under the Jones Act, 46 U.S.C. App. 688, and the "saving to suitors" clause, 28 U.S.C. 1333(1), are governed by the state or federal law of *forum non conveniens*.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Statutory provisions involved | 1 |
| Statement | 3 |
| Discussion | 6 |
| Conclusion | 20 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Air Crash Disaster Near New Orleans, In re*, 821 F.2d 1147 (5th Cir. 1987), vacated, 490 U.S. 1032 (1989) | 5 |
| *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987) | 14, 15 |
| *Bainbridge* v. *Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932) | 6, 13, 15, 16 |
| *Camejo* v. *Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988) | 17, 19 |
| *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413 (1932) | 11, 12 |
| *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918) | 9 |
| *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988) | 17, 18 |
| *Chick Kam Choo* v. *Exxon Corp.*, 821 S.W.2d 190 (Tex. Ct. App. 1991) | 18 |
| *Dutile, In re*, 935 F.2d 61 (5th Cir. 1991) | 3 |
| *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) | 5 |
| *Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd, 486 U.S. 140 (1988) | 4, 17, 19 |
| *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) | 3, 9, 16, 17 |
| *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) | 11, 12 |
| *Helicopteros Nacionales de Columbia* v. *Hall*, 466 U.S. 408 (1984) | 15 |
| *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970) | 13 |
| *Hess* v. *United States*, 361 U.S. 314 (1960) | 14 |

Cases—Continued: Page

*Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990) ..... 17, 18, 19
*International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) ..... 14
*Just* v. *Chambers*, 312 U.S. 383 (1941) ..... 9
*Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920) ..... 7
*Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) ..... 9, 10, 13
*Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947) ..... 11, 12
*Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) ..... 13
*Madruga* v. *Superior Court*, 346 U.S. 556 (1954) ..... 6, 7, 8
*Markzannes* v. *Bermuda Star Line, Inc.*, 545 So.2d 537 (La. 1989), cert. denied, 493 U.S. 1043 (1990) ..... 4
*Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) ..... 7, 8
*Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981) ..... 11, 12
*Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966) ..... 16
*Quintero* v. *Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990) ..... 17, 18, 19
*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109 (1924) ..... 6, 12, 13
*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) ..... 7, 9, 10, 13
*Sibaja* v. *Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985) ..... 5
*Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917) ..... 9, 10
*Southern R.R.* v. *Mayfield*, 340 U.S. 1 (1950) ..... 5, 6, 13, 16, 17
*Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22 (1988) ..... 13
*Swift & Co.* v. *Compania Caribe*, 339 U.S. 684 (1950) ..... 20
*The Belgenland*, 114 U.S. 355 (1885) ..... 19-20
*The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875) ..... 10
*The Maggie Hammond*, 76 U.S. (9 Wall.) 435 (1870) ..... 20
*The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867) ..... 8



Cases—Continued: Page

*Willendson* v. *Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682) ..... 11
*World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980) ..... 14

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) ..... 10
Art. III ..... 7
Art. III, § 2, Cl. 1 ..... 7
Anti-Injunction Act of 1948, 28 U.S.C. 2283 ..... 17, 18
Federal Employers' Liability Act of 1908, 45 U.S.C. 51 *et seq.* ..... 3, 5, 16
45 U.S.C. 56 ..... 3
Jones Act of 1920, 46 U.S.C. App. 688 ..... 1, 3, 5, 13, 16
46 U.S.C. App. 688(a) ..... 3, 15, 16
Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 ..... 7
28 U.S.C. 1333 ..... 1
28 U.S.C. 1333(1) ..... 6, 7, 8
28 U.S.C. 1404(a) ..... 13
28 U.S.C. 1445(a) ..... 3
La. Code Civ. Proc. Ann. (West Supp. 1992):
Art. 123 ..... 2
Art. 123(B) ..... 4
Art. 123(C) ..... 4, 5, 13

Miscellaneous:

Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963) ..... 9
Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949) ..... 20

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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AMERICAN DREDGING COMPANY, PETITIONER

*v.*

WILLIAM ROBERT MILLER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1333 provides in pertinent part as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The Jones Act, 46 U.S.C. App. 688, provides in pertinent part as follows:

> **(a) Application of railway employee statutes; jurisdiction**
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the

United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

La. Code Civ. Proc. Ann. art. 123 (West Supp. 1992) provides:

> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 [U.S.C. App.] § 688 or federal maritime law.



## STATEMENT

1. Respondent, a Mississippi resident, moved to Pennsylvania to seek employment in 1987. Petitioner, a Pennsylvania corporation with its principal place of business in New Jersey, hired respondent to work on the M/V John R, a tug operating on the Delaware River. Respondent was injured in the course of that employment on the Delaware River. He was subsequently treated for his injuries in Pennsylvania, New York, and Mississippi. Pet. App. A10.

2. On December 1, 1989, respondent filed this action in the Civil District Court for the Parish of Orleans, Louisiana, seeking relief under general maritime law and the Jones Act, 46 U.S.C. App. 688.[1] Petitioner moved to dismiss the suit for lack of personal jurisdiction and under the doctrine of *forum non conveniens*. The state trial court rejected petitioner's challenge to personal jurisdiction because petitioner had appointed an agent for service of process in Louisiana.[2] Petitioner's motion to dismiss the complaint under the doctrine of *forum non conveniens* was granted, however.

Dismissal of the complaint was predicated on the trial court's finding, not challenged here, that Louisiana "ha[d] absolutely no connection with the case" and was

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[1] The Jones Act authorizes any seaman who suffers personal injury "in the course of his employment" to bring "an action for damages at law." 46 U.S.C. App. 688(a). Congress has provided that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in Jones Act suits. *Ibid.* Thus, the Jones Act "is based upon, and incorporates by reference" the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). Under the FELA, a plaintiff may sue in state or federal court (45 U.S.C. 56), and a state court action is not subject to removal to federal court. See 28 U.S.C. 1445(a); *In re Dutile*, 935 F.2d 61, 62 (5th Cir. 1991) (applying Section 1445(a) to Jones Act suit).

[2] The petition does not seek review of the state court's determination on the issue of personal jurisdiction. We therefore do not address that issue here.

an inconvenient forum. Pet. App. A4. The court acknowledged that these facts were irrelevant under state law, and that La. Code Civ. Proc. Ann. art. 123(C) (West Supp. 1992) expressly barred dismissal of respondent's claim on grounds of convenience.[3] Pet. App. A4. The court nevertheless held that the state law of *forum non conveniens* was preempted in maritime actions filed in state court, relying on the Fifth Circuit's analysis of this issue in *Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d 307 (1987), rev'd on other grounds, 486 U.S. 140 (1988). Applying the federal maritime rule of *forum non conveniens*, the court dismissed the action. Pet. App. A4.

3. The Louisiana Court of Appeal for the Fourth District affirmed. Pet. App. A5-A9. The court of appeal concluded that "[i]n the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case." *Id.* at A8.[4]

4. The Supreme Court of Louisiana reversed. Pet. App. A10-A19. The court first determined that under Article 123(C) of the Louisiana Code of Civil Procedure, "the doctrine of forum non conveniens is specifically made unavailable in * * * Jones Act or maritime law case[s]"

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[3] Under La. Code Civ. Proc. Ann. art. 123(B) (West Supp. 1992), a state court is authorized to dismiss a suit "in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state." Article 123(C), however, provides that "[t]he provisions of Paragraph B shall not apply to claims brought pursuant to 46 [U.S.C. App.] § 688 or federal maritime law."

[4] The court of appeal acknowledged (Pet. App. A7) that in *Markzannes* v. *Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), cert. denied, 493 U.S. 1043 (1990), the Louisiana Supreme Court had applied Article 123(C) to an admiralty suit brought in state court. But the court of appeal agreed with the trial court that the per curiam decision in *Markzannes* was not binding. Pet. App. A8.



brought in Louisiana courts. Pet. App. A14. The court further determined that state law was not preempted. The court reasoned that States are free to provide remedies for maritime torts as long as the remedy does not contravene a "fundamental feature of admiralty law," and that the rule of *forum non conveniens* applied by federal courts did not represent one of those "fundamental feature[s]." *Id.* at A15.

The court relied primarily on the decision in *Southern R.R.* v. *Mayfield*, 340 U.S. 1, 3 (1950). *Mayfield* held that state courts are not required to apply the federal doctrine of *forum non conveniens* in cases arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, even though liability under the FELA is governed by federal substantive law. Pet. App. A15-A16. The Louisiana Supreme Court concluded that the *Mayfield* analysis should also govern Jones Act claims in state courts because the Jones Act expressly incorporates the remedial provisions of the FELA. 46 U.S.C. App. 688. Further, the court found it significant that in diversity cases, the Fifth and Eleventh Circuits had treated the doctrine of *forum non conveniens* as "procedural" for purposes of determining choice-of-law under *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). See Pet. App. A16-A17 (discussing *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987), vacated on other grounds, 490 U.S. 1032 (1989); *Sibaja* v. *Dow Chemical Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985)). In that regard, the court added that the application of Article 123 (C) will "not be outcome determinative," because the substantive law to be applied in this case—the Jones Act and general federal maritime law—will be the same whether the case is adjudicated in Louisiana or Pennsylvania. Pet. App. A17-A18. Accordingly, the court held that "the doctrine of forum non conveniens is not a substantive feature of general maritime law" and that the state rule is not preempted. *Id.* at A19.

## DISCUSSION

In our view, the Supreme Court of Louisiana correctly determined that the doctrine of *forum non conveniens* is not a characteristic feature of admiralty law that must be governed by a uniform federal rule. Under the "saving to suitors" clause of 28 U.S.C. 1333(1), a state court exercising jurisdiction over a maritime claim is authorized to "adopt such remedies, and to attach to them such incidents, as it sees fit, so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga* v. *Superior Court*, 346 U.S. 556, 561 (1954). The State's policy decision to make the defense of *forum non conveniens* unavailable in maritime and Jones Act cases properly brought in its courts merely provides a remedy for a tort that is itself defined by substantive maritime law. That is a permissible choice under federal maritime preemption principles. See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924). That policy is supported, moreover, by Congress's determination that the States' venue determinations should prevail under the Jones Act (see *Bainbridge* v. *Merchants & Miners Transportation Co.*, 287 U.S. 278, 281 (1932)), and with this Court's determination that States are free to adopt or reject a *forum non conveniens* defense in cases brought under the FELA. See *Southern R.R.* v. *Mayfield*, 340 U.S. 1, 3-4 (1950).

We also do not believe that plenary review of the Louisiana Supreme Court's decision is necessary. The federal interest in maritime commerce is not impaired by the decision because the court reached the correct result on the facts presented. Further, we do not believe that the conflict between the decision of the Supreme Court of Louisiana and a line of contrary decisions of the Fifth Circuit needs to be resolved by this Court. For the reasons set forth below, the conflict has very limited practical significance, and the Fifth Circuit decisions have all arisen in the international context, where the admiralty defense of *forum non conveniens* has traditionally had its greatest force.



1. Article III extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. That grant of jurisdiction encompasses authority to develop federal common law—"to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (citations omitted); see *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920) ("The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law."). Congress has nevertheless continued to preserve a substantial role for the States in the adjudication of maritime disputes.

a. In implementing its authority over admiralty cases, Congress gave district courts "original jurisdiction, exclusive of the courts of the States, of * * * [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. 1333(1). Although that provision refers to the "exclusive" jurisdiction of the district courts, it is well settled that States retain broad authority to hear admiralty and maritime claims under the so-called "saving to suitors" clause.

This Court has interpreted the "savings to suitors" clause —which first appeared in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77[5]—to mean that "[a]dmiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that

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[5] As originally enacted, the clause provided for the exclusive jurisdiction of the district courts, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 77. Although the clause was amended to its present form in 1948 and 1949, "this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act." *Madruga* v. *Superior Court*, 346 U.S. 556, 560 n.12 (1954); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-223 (1986) ("1948 and 1949 amendments effected no substantive change").

is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga* v. *Superior Court*, 346 U.S. at 560.[6] Section 1333(1) accordingly "leave[s] state courts 'competent' to adjudicate maritime causes of action in proceedings *'in personam,'* that is, where the defendant is a person, not a ship or some other instrument of navigation." 346 U.S. at 560-561.

b. It is also well settled that when a state court has "concurrent jurisdiction" over a maritime claim under the "saving to suitors" clause, the State may "adopt such remedies, and * * * attach to them such incidents, as it sees fit, so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga* v. *Superior Court*, 346 U.S. at 561. "Stated another way, the 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-223 (1986).

The so-called "reverse-*Erie*" doctrine is based upon general rules of admiralty preemption. As this Court has noted:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

[6] The exclusion of *in rem* jurisdiction is attributable to the fact that the "saving to suitors" clause was originally phrased to cover only "common law" remedies, and "[a] proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law." *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867).



*Romero*, 358 U.S. at 373 (footnote omitted). Thus, state law may "modify or supplement" (*Just* v. *Chambers*, 312 U.S. 383, 388 (1941)) general maritime law, if the state rule does not "contravene[] the essential purpose expressed by an act of Congress or work[] material prejudice to the characteristic features of the general maritime law or interfere[] with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216 (1917).[7]

This Court has emphasized that "it would be difficult, if not impossible, to define with exactness" when state law rules may be applied in maritime cases. *Jensen*, 244 U.S. at 216; see *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738 (1961); Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 34 (1963). And it has approved the choice of state law rules in many diverse contexts—allowing, for example, the maritime application of "[s]tate-

[7] In *Jensen*, a dockworker was killed while unloading cargo from a vessel engaged in interstate commerce. The state court had held that his survivors were entitled to relief under the New York Workers' Compensation Act. This Court, however, reversed, holding that a "necessary consequence" of applying the state law "would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded." 244 U.S. at 217. For other instances in which this Court has found state law preempted by maritime law, see, *e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741-742 (1961) (diversity action; state statute of frauds cannot defeat maritime contract); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (action in state court; federal admiralty rule requiring tort defendant to show validity of release preempts state-law rule requiring tort plaintiff to prove invalidity of release); *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 382-384 (1918) (action removed to federal court; admiralty law measure of recovery governs where common law measure is different).

created liens, * * * [s]tate remedies for wrongful death and state statutes providing for the survival of actions, * * * [s]tate rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, [and] state laws regulating the effect of a breach of warranty under contracts of maritime insurance." *Romero*, 358 U.S. at 373 (footnotes omitted).

While the import of those decisions is that every state rule regulating maritime matters must be considered carefully on its facts, this Court in *Jensen* made clear that preemption must be evaluated in terms of the purposes underlying the constitutional grant of admiralty jurisdiction—to provide for "uniformity and consistency * * * on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." 244 U.S. at 215 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).[8] And the process of decision, in practice, is "one of accommodation" between the need for uniformity and the State's interest in regulating the matter at hand. *Kossick*, 365 U.S. at 739. Thus, even where a state rule of decision may "conflict[] with a rule of maritime law," the Court has been willing to uphold a state law when the maritime rule "did not require uniformity." *Romero*, 358 U.S. at 373-374.

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[8] The Court in *Jensen* analogized the doctrine of admiralty preemption to the limitations on state power under the dormant Commerce Clause (244 U.S. at 216-217):

> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, * * * Congress can alone act upon it and provide the needed regulations. * * * And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.



2. The Supreme Court of Louisiana's holding in this case—that the State may apply its own open-forum policy, rather than a federal doctrine of *forum non conveniens*—is consistent with this Court's cases interpreting the doctrine of *forum non conveniens* and the scope of admiralty preemption.

a. The doctrine of *forum non conveniens* is not a characteristic feature of admiralty that requires uniform application. It is, instead, a rule used by courts to allocate business in a fair and sensible manner among available judicial forums.

It is true that the doctrine has long been applied in admiralty cases, see, *e.g.*, *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413 (1932); *Willendson* v. *Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682), but it is not a special feature of admiralty. See *Canada Malting*, 285 U.S. at 423 ("[c]ourts of equity and of law [have] also occasionally decline[d], in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal"). The doctrine generally applies to any case brought in federal court, including diversity cases governed by state law. See, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947); *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947).[9] And the doctrine has also been recognized as "part of the common law of many States." *Piper Aircraft*, 454 U.S. at 248 n.13. In fact, this Court has treated admiralty decisions defining the substance of

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[9] In *Gulf Oil Corp.* v. *Gilbert*, *supra*, which established the applicability of the doctrine of *forum non conveniens* in diversity cases, Justice Black dissented based in part on his view that the doctrine of *forum non conveniens* had been applied in martime cases "[f]or reasons peculiar to the special problems of admiralty." 330 U.S. at 513. The Court, however, found that the doctrine had been validly applied in a broad variety of cases in law and equity, and held that it could properly be applied in a district court sitting in diversity. *Id.* at 504-505, 507-512.

*forum non conveniens* analysis as binding precedent in the nonmaritime context. See *Piper Aircraft*, 454 U.S. at 247-249 (treating the admiralty case of *Canada Malting* as binding precedent in nonadmiralty diversity action).

This Court's precedents confirm that the doctrine operates as a discretionary rule of convenience—not as a substantive rule of maritime commerce that must be uniform. The principle of *forum non conveniens*, as generally applied, "is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 507. In implementing that doctrine, this Court has refused to "lay down a rigid rule to govern discretion." *Piper Aircraft*, 454 U.S. at 249. Rather, it has explained that "when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." *Id.* at 241 (quoting *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. at 524).

b. In this case, Louisiana enacted a different rule of forum convenience: once personal jurisdiction and venue are established, state courts have no discretion to withhold a remedy in maritime cases. That policy intrudes only minimally on the federal interest in maritime uniformity. As this Court made clear in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. at 124, where a state law deals "merely with the remedy in the state courts," without "modify[ing] the substantive maritime law" at issue, the doctrine of admiralty preemption does not require invalidation of the state law.[10]

[10] A different case would be presented if Louisiana barred enforcement of a forum selection clause agreed to by parties to a maritime contract. Martime contracts that are not of a strongly "local" nature are typically governed by uniform federal law (see *Kossick*, 365 U.S. at 735, 741), but in this case the parties apparently did not make forum selection a part of their commercial negotiations.



In *Red Cross*, the Court held that a New York court could award specific performance of an arbitration clause in a maritime contract even though that remedy was unavailable under admiralty law. As the Court later explained, "since such clauses are valid in admiralty and their breach gives rise to an action for damages, to compel arbitration is really to do no more than substitute a different and more effective remedy for that available in admiralty." *Kossick*, 365 U.S. at 740.

The same principle governs here. Article 123(C) does not enhance or diminish the substantive maritime rights or duties at issue. The general maritime law and the Jones Act will supply the rule of decision whether this case is brought in Louisiana or Pennsylvania. Pet. App. A17-A18.[11] Under these circumstances, the State's legitimate and substantial interest in adopting its own policies governing access to its courts should not be displaced. See, *e.g.*, *Southern R.R.* v. *Mayfield*, 340 U.S. at 3-4 (state law may accept or reject doctrine of *forum non conveniens* as a matter of state policy in FELA cases); *Bainbridge* v. *Merchants & Miners Transportation Co.*, 287 U.S. at 280 (Jones Act cases in state court are not governed by Jones Act venue provision; "we should be slow to impute to Congress an intention * * * to interfere with the statutory provisions of the various states fixing the venue of their own courts"); cf. *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 32 (1988) (holding that federal transfer-of-venue provisions set forth in 28 U.S.C. 1404(a) govern in diversity actions, and rejecting the

[11] The factors to be considered in determining the applicability of the Jones Act were set forth in this Court's decisions in *Lauritzen* v. *Larsen*, 345 U.S. 571, 583-592 (1953), and *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 308-309 (1970). Similar considerations apply to determine the applicability of general maritime law. See *Romero*, 358 U.S. at 381-382.

claim that state choice-of-forum policies must be applied under *Erie*).

Where the State merely provides a remedy for a tort under substantive maritime law, "the intrusion into federal interests [is] so minimal" (*Hess* v. *United States*, 361 U.S. 314, 334 n.13 (1960) (Harlan, J., dissenting)) that it is possible, without substantial risk to uniformity, to accommodate the State's interest in keeping its courts open to maritime claimants.[12] Indeed, because the doctrine of *forum non conveniens* presupposes that assertion of jurisdiction would comport with due process, there is little danger that an open forum policy will work material harm to the federal interests sought to be protected by a uniform system of maritime law.

The "strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction * * * under circumstances that would offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 113 (1987) (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945)). That principle, in turn, requires a court to "consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. [A court] must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" *Ibid.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). Those considerations—which are analogous to factors considered under the doctrine of *forum non conveniens*—offer substantial assurance that a state court's

[12] In this case, the trial court held that petitioner's appointment of an agent for service of process in Louisiana was sufficient to establish personal jurisdiction. Pet. App. A3. Petitioner does not contest that determination. Accordingly, it must be assumed for present purposes that the State has a constitutionally sufficient interest in adjudicating this controversy against petitioner.



assertion of jurisdiction will not unreasonably burden an entity operating in maritime commerce.[13]

c. This analysis of general admiralty preemption principles derives further support from congressional enactments. This Court's interpretation of the Jones Act and the FELA indicates that Congress has not generally required States to apply a federal rule of forum selection for actions otherwise governed by a uniform body of federal substantive law.

(i) Section 688(a) of the Jones Act provides that venue is proper in "the district in which the defendant employer resides or in which his principal office is located." [14] *In Bainbridge* v. *Merchants & Miners Trans-*

[13] Indeed, where a claim does not arise out of, and is unrelated to, the defendant's activities in a State, jurisdiction over a defendant foreign corporation may be sustained only if the company has "continuous and systematic general business contacts" with the State. *Helicopteros Nacionales de Columbia* v. *Hall*, 466 U.S. 408, 415-416 (1984). It is thus unlikely that a shipping company's passing commercial contacts within a State will suffice to support personal jurisdiction over a claim unrelated to the State. See *id.* at 414-415 (describing the kind of "continuous and systematic" contacts necessary to sustain "general jurisdiction"). Further, when a lawsuit involves foreign defendants, the "unique burdens" of defending a lawsuit abroad have "significant weight" in evaluating due process concerns. *Asahi*, 480 U.S. at 114. And as this Court in *Asahi* emphasized:

> [t]he procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

480 U.S. at 115. Thus, the federal interest in international comity will be subject to scrutiny in state court, irrespective of the availability of a state-law *forum non conveniens* defense.

[14] Although Section 688(a) refers to "jurisdiction," this Court has explained that the provision governs venue rather than subject

*portation Co.*, 287 U.S. at 280-281, the Court held that Section 688(a) does not govern venue in Jones Act suits *filed in state court*. Rather, "venue [in such actions] should * * * be[] determined by the trial court in accordance with the law of the state." *Id.* at 281.[15]

Although *Bainbridge* does not squarely address the question of *forum non conveniens*, it does indicate that Congress either regarded venue under the Jones Act as a matter of judicial housekeeping that would be federally prescribed only for the federal courts, or that the States' interest in regulating their own dockets outweighed any need for a uniform venue policy in state and federal courts. Further, the Court's interpretation of Section 688(a) was premised in part on the view that venue in state courts, even for federal maritime causes of action, is presumptively a matter of state law under our federal system. See *Bainbridge*, 287 U.S. at 281. If a federal rule of forum selection were essential to preserve the necessary uniformity of maritime law, Congress presumably would have required States to adhere to the venue rule adopted in Section 688 for federal courts. But it did not.

(ii) This Court's construction of the FELA in *Southern R.R.* v. *Mayfield*, *supra*, also supports the conclusion that maritime commerce does not require a uniform rule of forum selection. Under the FELA, state courts must apply uniform federal law in determining whether a railroad is liable to its employees. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). The Court held in *Mayfield*, however, that state courts are not required to

matter jurisdiction. See *Pure Oil Co.* v. *Suarez*, 384 U.S. 202, 203 (1966).

[15] The plaintiff in *Bainbridge* filed suit in Philadelphia County, Pennsylvania, but his employer's principal office was in Baltimore, Maryland. 287 U.S. at 279. The state court dismissed the action on the ground that venue was improper under Section 688(a). This Court reversed that decision, noting that the federal rule did not bind the state court.



adhere to a uniform federal doctrine of *forum non conveniens* in FELA cases. 340 U.S. at 3-4.

We see no reason to conclude that the Court should depart from the interpretation of FELA preemption adopted in *Mayfield* because the Jones Act, which applies to employees' claims against maritime shippers, "is based upon, and incorporates by reference, the [FELA]," *Garrett*, 317 U.S. at 244. *Mayfield* establishes that Congress has not determined that the federal interest in uniform law governing the liability of rail employers also requires a uniform rule of forum selection. That congressional policy choice counsels strongly against preemption here as well.

3. We do not share petitioner's view that plenary review of the decision in this case is necessary. To be sure, there is a conflict between the decision below and a series of Fifth Circuit decisions holding that the doctrine of *forum non conveniens* is a feature of general maritime law that binds state as well as federal courts. See *Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176, 180 (5th Cir. 1990); *Quintero* v. *Klaveness Ship Lines*, 914 F.2d 717, 725-726 (5th Cir. 1990); *Camejo* v. *Ocean Drilling & Exploration*, 838 F.2d 1374, 1382 (5th Cir. 1988); *Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140 (1988).[16] This conflict, however, has limited practical significance.

[16] In *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988), this Court adverted to, but did not resolve, the question presented in this case. The plaintiff filed suit in federal district court, but the district court dismissed several defendants on grounds of *forum non conveniens*. The plaintiff filed a second action in Texas state court, but the defendants enjoined that action in federal court. The Fifth Circuit affirmed on the ground that "[u]nder the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction." *Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d at 324. This Court reversed, holding that the federal action was barred by the Anti-Injunction Act, 28 U.S.C. 2283. Re-

Admiralty claims filed in federal court, or removed by defendants who have a right to litigate in federal court, will be governed by the federal doctrine of *forum non conveniens*. Maritime plaintiffs who wish to avoid the application of the federal rule can simply file their actions in state court. In light of the preemption analysis adopted by the Louisiana Supreme Court here, claimants who have a right to litigate their maritime claims in the Louisiana state courts will not be barred from doing so by the contrary views of the Fifth Circuit.

Plaintiffs entitled to choose to litigate in state court, *i.e.*, those who sue defendants who have no right to remove the action, are adversely affected by the Fifth Circuit's view of preemption only if they mistakenly file their action in federal court first. Under those circumstances, the Fifth Circuit has required dismissal with prejudice so that the claimant cannot refile the action in state court.[17]

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jecting the claim that the "relitigation exception" to Section 2283 applied, the Court reasoned that the preemption question had not been litigated in the first federal district court action and decilned to reach the merits of that question. 486 U.S. at 149-150.

Following the dissolution of the federal court's injunction, the Texas Court of Appeals held that Texas law had abolished the doctrine of *forum non conveniens* in cases involving a death or injury that occurred outside the State. *Chick Kam Choo* v. *Exxon Corp.*, 821 S.W.2d 190, 191 (Tex. Ct. App. 1991). On April 29, 1992, the Texas Supreme Court granted review, and the case is still pending in that court.

[17] For example, in *Ikospentakis*, the Fifth Circuit held that the district court had abused its discretion in granting a foreign plaintiff's motion to dismiss without prejudice a Jones Act suit against a Panamanian shipping company and a Greek citizen. The court of appeals held that dismissal without prejudice would allow the plaintiff to sue in the Louisiana courts, where the doctrine of *forum non conveniens* would be unavailable. 915 F.2d at 180. The court of appeals noted, moreover, that it viewed Louisiana's rule as "erroneous" and that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law." *Ibid.* And in *Quintero*, the Fifth Circuit affirmed the district court's refusal to grant a voluntary dismissal without prejudice on like grounds. 914 F.2d at 725-726. Finally, the court of appeals in *Camejo* held that the dis-



Because dismissal with prejudice can readily be avoided by filing the action in state court as an initial matter, we do not believe this conflict is one which requires intervention by this Court at this time.

If the Court determines that review of the preemption issue presented here is important, we nevertheless believe that it would be preferable for the Court to address the issue in a case involving international maritime commerce. Unlike this case, each of the Fifth Circuit decisions cited above involved at least some foreign parties or interests.[18] The Fifth Circuit's determination in *Chick Kam Choo* that the doctrine of *forum non conveniens* preempts state law in maritime cases relied heavily on the international implications of asserting jurisdiction. 817 F.2d at 321-324.[19]

The doctrine of *forum non conveniens* was originally invoked by courts to dismiss claims involving foreign parties (see, *e.g.*, *The Belgenland*, 114 U.S. 355, 365-366

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trict court had properly declined to remand the case to the Texas state court, because the state court would not be free to rule differently on the issue of *forum non conveniens* decided by the federal court. 838 F.2d at 1382.

[18] See *Ikospentakis*, 915 F.2d at 177 (suit by Greek citizen against Panamanian corporation and other Greek citizen); *Quintero*, 914 F.2d at 719 (Philippine sailor injured while unloading a Liberian-registered, Norwegian-owned ship); *Camejo*, 838 F.2d at 1375 (Brazilian plaintiff injured in Brazil; one of defendants was Brazilian entity); *Chick Kam Choo*, 817 F.2d at 309 (Singapore national killed in Singapore).

[19] Indeed, the court of appeals in *Chick Kam Choo* went out of its way to make reference to the foreign residence of the plaintiff. See 817 F.2d at 324 ("Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction."); *id.* at 320 (noting, in reference to its premption analysis, that "[w]hile Texas has an undeniably powerful interest in defining the jurisdiction of its courts, its interest in the substance of claims by non-resident aliens arising from activities in foreign lands cannot be considered strong").

(1885); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1870). The claim of preemption may therefore have greater force where international interests are implicated.[20] This case accordingly does not implicate the full range of interests traditionally protected by the *forum non conveniens* doctrine in admiralty.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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[20] As recently as 1950, this Court observed that it had "never had occasion to apply [the doctrine of *forum non conveniens*] to a suit brought by a United States citizen" and that "[s]uch application has been rare even in the lower federal courts." *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 697 (1950); see Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12, 41-47 (1949).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 80203

FILED
JUN 29 1992
OFFICE OF THE CLERK

No. 91-1950

IN THE

# Supreme Court of the United States

OCTOBER TERM 1991

AMERICAN DREDGING COMPANY,

*Petitioner,*

—v.—

WILLIAM ROBERT MILLER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION OF LAW PRESENTED

Whether the doctrine of *forum non conveniens* as applied by the federal courts in admiralty cases must be applied to maritime claims filed in state courts.

## TABLE OF CONTENTS

PAGE

Question of Law Presented ..... i

Table of Authorities ..... iv

Interest of *Amicus Curiae* ..... 2

Summary of Reasons for Granting the Writ ..... 5

Reasons for Granting the Writ ..... 6

I. THE CONFLICT BETWEEN THE FEDERAL AND STATE COURTS IS PERSISTENT AND VEXING ..... 6

II. THE CONFLICT IS AN IMPEDIMENT TO INTERSTATE AND INTERNATIONAL COMMERCE ..... 8

III. THIS COURT SHOULD UPHOLD THE PRINCIPLE OF UNIFORMITY OF MARITIME LAW ..... 10

A. The Intent to Maintain National Uniformity Was Confirmed in the Constitution .... 10

B. Although Congress Has Delegated a Portion of Admiralty Law Jurisdiction to the State Courts, They Are Required to Apply Federal Admiralty Law ..... 11

C. Application of the *Forum Non Conveniens* Doctrine Cannot Be Avoided By Characterizing It as "Procedural." ..... 12



D. The Doctrine of *Forum Non Conveniens* Is a "Characteristic Feature" of the Maritime Law which Must Be Applied in Maritime Cases Such as the One Before this Court .. 13

IV. UNIFORMITY REQUIRES THAT IN MARITIME CASES, FEDERAL DOOR-CLOSING MEASURES, SUCH AS *FORUM NON CONVENIENS*, ARE BINDING ON THE STATE COURTS ..... 14

Conclusion ..... 16

Proof of Service by Mail ..... 17

## TABLE OF AUTHORITIES

**Cases:** PAGE

*Alcoa Steamship Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980) ... 8, 14

*Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) ..... 7

*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) ..... 4

*Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949) ..... 7

*Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 1980 AMC 1993 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) ..... 7

*Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988) ..... 6

*Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932) ..... 15

*Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988) ... 4

*Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. 14th Dist. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992) ..... 6, 9, 10, 13

*Galban Lobo Trading Co. v. Canadian Leader Ltd.*, 1963 AMC 988 (S.D.N.Y. 1958) ..... 7

*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).. 12

*Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992) ..... 4, 10



PAGE

*Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) ..... 12, 13

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) ..... 15

*Hanna v. Plumer*, 380 U.S. 460 (1965) ..... 13

*Ikospentakis v. Thelassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990) ..... 6, 7, 13

*Kassapas v. Arkon Shipping Agency*, 485 So.2d 565 (La. Ct. App. 5th Cir.), *writ denied*, 488 So.2d 203 (La.), *cert. denied*, 479 U.S. 940 (1986) ..... 6

*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) ..... 8-9, 15

*Lindgren v. United States*, 281 U.S. 38 (1930) ..... 15

*Markzannes v. Bermuda Star Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied sub nom. Bermuda Star Line, Inc. v. Markozannes*, 493 U.S. 1043 (1990) ..... 6

*Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F. Supp. 579, 1985 AMC 2381 (N.D. Cal. 1985) ..... 7

*Missouri v. Mayfield*, 340 U.S. 1 (1950) ..... 15

*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985) ..... 14

*Ocean Shelf Trading v. Flota Mercante Grancolumbiana*, 638 F. Supp. 249, 1986 AMC 2482 (S.D.N.Y. 1986) ..... 7

*Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) ..... 4

*Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924)... 12

*Piper v. Reyno*, 454 U.S. 235 (1981) ..... 15

*Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) ..... 4

PAGE

*Red Sea Insurance v. S.S. LUCIA DEL MAR*, 1983 AMC 1630 (S.D.N.Y. 1982), *aff'd*, 1983 AMC 1631 (2d Cir. 1983) ..... 7

*Southland v. Keating*, 465 U.S. 1 (1984) ..... 14, 15

*Testa v. Katt*, 330 U.S. 386 (1947) ..... 15

*The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). 14

*The HINE v. Trevor*, 71 U.S. (4 Wall.) 555 (1867)..... 15

*The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1875)..... 8

*The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867) ..... 15

*The WILJA*, 113 F.2d 646 (2d. Cir.), *cert. denied sub nom. O/Y Wipu v. Dreyfus*, 311 U.S. 687 (1940) ..... 7

*Tramp Oil v. MERMAID I*, 743 F.2d 48, 1985 AMC 459 (1st Cir. 1984) ..... 7

*Wall Street Traders Inc. v. Sociedad Espanola de Construccion Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964)..... 7

*Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682) ..... 13

**Constitution:**

United States Constitution, Art. I, § 8, cl. 3 ..... 10

United States Constitution, Art. I, § 8, cl. 18.....10, 11

United States Constitution, Art. III, § 2, cl. 3..... 11

United States Constitution, Art. VI, § 2..... 11



PAGE

**Statutes:**

Federal Arbitration Act,
9 U.S.C. §§ 1-15..... 2
9 U.S.C. § 3 ..... 14

15 U.S.C. § 1346(b)..... 14

28 U.S.C. § 1333 .....11, 14

Water Pollution Control Act Amendments of 1972,
33 U.S.C. §§ 1251-1376 ..... 2

United States Inland Navigation Rules,
33 U.S.C. §§ 2001-2073 ..... 3

Carriage of Goods by Sea Act,
46 U.S.C. §§ 1300-1315 ..... 2

**Conventions and Treaties:**

Assistance and Salvage Convention (1910), 37 Stat. 1658 (1913), *reprinted in* 6 M. M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 4-1 (7th rev'd ed. 1990) ("BENEDICT")..... 3

Civil Liability for Oil Pollution Damages Convention (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 ..... 3

Collision Convention (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 ..... 3

Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4..... 3

Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 ..... 3

Maritime Liens and Mortgages Convention (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3..... 3

PAGE

1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT, Doc. No. 3-4 ..... 2-3

Ocean Bills of Lading Convention (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 ..... 3

**Regulations:**

33 C.F.R. ch. 1, subch. D, Special Note (1987) ..... 3

**Other:**

Maritime Law Association of the United States ("MLA") Articles of Association ..... 2

MLA Resolutions:

MLA Minutes, MLA Doc. No. 588 (1975) ..... 4

MLA Minutes, MLA Doc. No. 669 (1986) ..... 4

MLA Report, MLA Doc. No. 671 (1987) ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM 1991

**No. 91-1950**

AMERICAN DREDGING COMPANY,

*Petitioner,*

—v.—

WILLIAM ROBERT MILLER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by American Dredging Company ("Petitioner"). Both Petitioner and Respondent have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

## INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-three years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-15.

3 *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 M. M. COHEN, BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3-35 to 3-78.2 (7th rev'd ed. 1990) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.



MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-nine national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be

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4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Senegal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-28; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.133 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.2 to 5-44.4.

taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. Application of state open-forum statutes to maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. The Louisiana court's holding also perpetuates the now chronic conflict between Louisiana and Texas State Courts and the United States Court of Appeals for the Fifth Circuit.

Apart from the inherent problems arising from uncertainty in the application of a federal door-closing measure, there is the risk that state courts will neglect other elements of admiralty law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992) (applying state strict liability statute to mar-

6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *E.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).



itime tort). Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and thus the practices of MLA's membership and the wide variety of interests represented.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

The problem of disparate treatment of *forum non conveniens* motions by state and federal courts is chronic and vexing. Forum shopping is encouraged by the difference between the law applied by federal and state courts, and produces a burden on the federal courts because remand to the state courts may sometimes, in the federal court's view, result in injustice. Lack of uniform treatment of this issue is an impediment to interstate and international commerce.

Congress has granted state courts only limited jurisdiction to hear maritime cases. Maritime cases are governed by federal law which applies uniformly, as a constitutional requirement, in federal and state courts alike. Characterization of a maritime law doctrine as "procedural" cannot avert its application, especially when a characteristic maritime doctrine is at issue.

The federal doctrine of *forum non conveniens* is a door-closing measure which must be enforced by state courts in maritime cases regardless whether an analogous measure exists under state law.

## REASONS FOR GRANTING THE WRIT

### I

### THE CONFLICT BETWEEN THE FEDERAL AND STATE COURTS IS PERSISTENT AND VEXING.

The Fifth Circuit and Texas and Louisiana State Courts have been in conflict for years on precisely this issue.[9] *See, e.g., Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. 14th Dist. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992). *Compare, e.g., Markzannes v. Bermuda Star Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied sub nom. Bermuda Star Line, Inc. v. Markozannes*, 493 U.S. 1043 (1990), *and Kassapas v. Arkon Shipping Agency*, 485 So.2d 565 (La. Ct. App. 5th Cir.), *writ denied*, 488 So.2d 203 (La.), *cert. denied*, 479 U.S. 940 (1986), *with Ikospentakis v. Thelassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990), *and Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1382 (5th Cir. 1988). *See also* Petition n.4, at 11-12 (tracing history of *Chick Kam Choo v. Exxon Corp.*).

This distressing disharmony has already led to a burden on the federal courts in at least one case in which the Fifth Circuit felt compelled to refuse to allow a voluntary dismissal of a federal action because the plaintiff would have then proceeded in

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9 For example, in *Ikospentakis*, the Fifth Circuit observed:

> That the [*forum non conveniens*] defense is available to [defendants] and that it would be "stripped" from them in Louisiana state court, albeit in violation of the constitution's supremacy clause, are equally certain propositions. . . .
>
> . . . At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous rule would blink at reality and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result.

915 F.2d at 178, 180.



a state court in which, as a practical matter, the doctrine of *forum non conveniens* would not be applied, thus prejudicing the foreign defendants. *Ikospentakis*, 915 F.2d at 180. Particularly in view of the burdens now placed on the federal courts, their dockets should not be further clogged by cases which could be entrusted to the state courts if those courts would apply governing federal doctrines.

Conflict on the applicability of *forum non conveniens* will continue to be a significant burden on the federal courts because of the variety of contexts in which the doctrine is raised. *See, e.g., Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949) (salvage); *Tramp Oil v. MERMAID I*, 743 F.2d 48, 1985 AMC 459 (1st Cir. 1984) (maritime lien); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 1980 AMC 1993 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) (breach of marine insurance contract); *The WILJA*, 113 F.2d 646 (2d. Cir.), *cert. denied sub nom. O/Y Wipu v. Dreyfus*, 311 U.S. 687 (1940) (breach of charter party); *Ocean Shelf Trading v. Flota Mercante Grancolumbiana*, 638 F. Supp. 249, 1986 AMC 2482 (S.D.N.Y. 1986) (collision); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F. Supp. 579, 1985 AMC 2381 (N.D. Cal. 1985) (products liability for negligent design of ship's engine); *Red Sea Insurance v. S.S. LUCIA DEL MAR*, 1983 AMC 1630 (S.D.N.Y. 1982), *aff'd*, 1983 AMC 1631 (2d Cir. 1983) (cargo loss); *Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) (general average); *Wall Street Traders Inc. v. Sociedad Espanola de Construccion Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964) (breach of ship conversion contract); *Galban Lobo Trading Co. v. Canadian Leader Ltd.*, 1963 AMC 988 (S.D.N.Y. 1958) (breach of contract of carriage). While the courts in some of these cases decided to retain jurisdiction, each applied the doctrine of *forum non conveniens* to the maritime causes of action before it, thus illustrating the breadth of the range of commercial interests affected by the doctrine and the frequency with which it arises.

## II

## THE CONFLICT IS AN IMPEDIMENT TO INTERSTATE AND INTERNATIONAL COMMERCE.

The principle mandating uniform treatment of maritime cases is not a vacant theoretical requirement, but rather was designed to afford fairness to all maritime litigants by having their conduct and rights governed by the same rules, regardless of where their cases were tried. In 1874, the Supreme Court stated in *The LOTTAWANNA*:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
>
> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) 558, 575 (1875).[10]

In 1920, the Court in *Knickerbocker Ice Co. v. Stewart*, referring to the approval and adoption of the general maritime law as part of the laws of the United States, held:

10 The Court of Appeals for the Second Circuit observed, there is "another policy reason for adhering to a uniform standard [of *forum non conveniens*], namely, not to run afoul of the treaty obligations of the United States." *Alcoa Steamship Co. v. M/V NORDIC REGENT*, 654 F.2d 147, 152 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980).



> The Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law . . . . Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose . . . .

253 U.S. 149, 160 (1920).

Because maritime commerce almost always involves international or interstate activities or at least sufficient contact with any number of fora to satisfy minimum due process requirements, operators and other defendants can be drawn into court almost anywhere, and since removal is not available simply because the claim is maritime, without application of the doctrine of *forum non conveniens*, defendants can be forced to test their rights and liabilities in an oppressive and vexatious location, even if neither the events nor the plaintiff has any meaningful contact whatsoever with the jurisdiction, as is the situation here. Thus, without uniformity, a litigant's rights would be subject to the vagaries of plaintiff's choice of forum, and commerce would suffer. *See Exxon*, 817 F.2d at 318 ("Applying state law inconsistent with 'characteristic features' would defeat the reasonably settled expectations of maritime actors.").

Uniformity is essential for predictability, and both tort and contract litigants are entitled to predictability in their legal relations. While the value of predictability is more often considered in connection with contracting parties who take account of the potential application of certain bodies of law in formulating their agreements, predictability is also of consequence in tort, where the parties are guided by their attorneys' perceptions of the law most likely to be applied and the rights and liabilities arising from those bodies of law. If attorneys cannot

make educated guesses about where an action will be tried and what rules will be applied, their ability to counsel their clients as to outcome, settlement value and every other aspect of the legal process will be greatly impaired. Litigation will be prolonged, as has happened here, as the series of appeals and reconsiderations multiply.[11]

If state courts are free to reject the doctrine of *forum non conveniens*, the uncertainties of litigation are vastly increased. Moreover, a state court which feels free to avoid application of one general maritime rule will be encouraged to overlook other admiralty principles. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La. 1992) (applying state strict liability statute to maritime tort).

## III

## THIS COURT SHOULD UPHOLD THE PRINCIPLE OF UNIFORMITY OF MARITIME LAW.

### A. The Intent to Maintain National Uniformity Was Confirmed in the Constitution.

Article I, Section 8, Clause 3 (the Commerce Clause) states:

> The Congress shall have power . . . To regulate commerce with foreign Nations, and among the several States . . . .

Article I, Section 8, Clause 18 (the Necessary and Proper Clause) states:

> The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

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11 *See* Appendices A, B and C of Petitioner's Petition (showing the progress of this case through successive appeals and reversal in the state court); Petition at 5-7. The history of *Exxon v. Chick Kam Choo* also illustrates this tortuous pattern. *See* Petition n.4, at 11-12.



Article III, Section 2, Clause 3 (the Admiralty Clause) states:

> The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

Article VI, Section 2 (the Supremacy Clause) states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Admiralty, and Necessary and Proper Clauses, and decisions interpreting them, confirm that, except in areas of purely local concern, the general maritime law is to apply in all admiralty and maritime cases in the United States. The Supremacy Clause requires state courts to follow established maritime law.

### B. Although Congress Has Delegated a Portion of Admiralty Law Jurisdiction to the State Courts, They Are Required to Apply Federal Admiralty Law.

Congress, in implementing constitutional provisions by statute, recognized from the first that it might not be convenient to bring every maritime case to one of the few federal courts. It therefore delegated to the state courts an alternative limited jurisdiction to hear ordinary *in personam* maritime causes of action not involving the special procedures and remedies of admiralty, such as arrests, perfection of liens, etc. This was done by the "saving to suitors" clause in the Judiciary Act of 1789, now reworded in section 1333 of Title 28 of the U.S. Code. This purpose, however, cannot be served if, because of uncertainty of the state court's application of maritime law, the federal courts become chary of permitting cases to proceed in state court.

### C. Application of the *Forum Non Conveniens* Doctrine Cannot Be Avoided by Characterizing It as "Procedural."

To say that the principle of uniformity ought to be limited to "substance" and denied to "procedure" does not resolve the question here.

In *Panama Railroad Co. v. Johnson*, the Court pointed out in discussing "admiralty and maritime jurisdiction":

> The framers of the Constitution were familiar with that [admiralty] system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its *procedural* features—under national control . . . .

264 U.S. 375, 386 (1924) (emphasis added). In many maritime cases, procedure is as important as substantive law.

The United States Supreme Court has rejected the use of the epithet "procedural" as a means of deciding cases. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), the Court clearly recognized the infirmity of such analysis:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which is used.

One of the cases with which the Court illustrated the point was *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942), a maritime case which had come up through the state courts. The Court held that a burden of proof, however it might be thought to be procedural, had such consequences that the federal rule must be used by the state court.



In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court reaffirmed its view that the dichotomy between "substance" and "procedure" was not adequate for deciding cases, while making clear that the criterion of "outcome-determination" is also not a universal rule. In both *Guaranty Trust* and *Hanna*, the Court stressed the discouragement of forum-shopping as a ground for looking beyond the common epithets in deciding whether federal or state standards should be applied.

The *Guaranty Trust* and *Hanna* cases indicate that the disparaging adjective "procedural" should not be used to reject a doctrine that is characteristic of the maritime law which governs this case.

### D. The Doctrine of *Forum Non Conveniens* Is a "Characteristic Feature" of the Maritime Law which Must Be Applied in Maritime Cases Such as the One Before this Court.

As stated in *Exxon*:

> Applying state law inconsistent with "characteristic features" would defeat the reasonably settled expectations of maritime actors. . . .
>
> . . . The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law. Texas cannot be allowed to thwart that policy in a maritime case brought to its courts. . . .
>
> . . . State law inconsistent with that doctrine [of *forum non conveniens*] cannot be applied in a maritime case.

817 F.2d at 318, 323-24 (footnote omitted). *Accord*, *Ikospentakis*, 915 F.2d at 178 ("This court has recognized that *forum non conveniens* is a "characteristic feature" of maritime law, tracing its history back to the earliest decisions of the federal courts."). The general maritime law has embraced the doctrine for over 190 years, *see Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682), and actually is its source.

*Alcoa Steamship*, 654 F.2d at 154 (reviewing cases). See cases cited *supra*, at 7, for examples of the maritime contexts in which *forum non conveniens* has been applied.

## IV

## UNIFORMITY REQUIRES THAT IN MARITIME CASES, FEDERAL DOOR-CLOSING MEASURES, SUCH AS *FORUM NON CONVENIENS*, ARE BINDING ON THE STATE COURTS.

Although the federal government has limited powers, when it exercises those powers, under the Supremacy Clause the states are bound thereby, even to the extent of giving exclusive jurisdiction to federal courts in such matters. *See, e.g.*, 15 U.S.C. § 1346(b) (tort claims against the United States). This constitutional principle has been applied on many occasions in the form of federal door-closing measures which bind state courts. This is especially true in admiralty cases where Congress has consistently pursued uniformity and given federal courts "exclusive" jurisdiction, except for delegating a limited jurisdiction to state courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

For example, in an admiralty case, the United States Supreme Court described the criteria for enforcing a foreign forum clause, thereby closing all courts here to certain disputes arising under international maritime contracts. *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Congress has mandated that *all* American courts must stay their proceedings whenever a party invokes a valid arbitration clause in a suit involving maritime, international or interstate commerce, regardless whether the underlying claims arise under federal or state law. 9 U.S.C. § 3. *See Southland v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).



The doctrine of *forum non conveniens* is another type of door-closing measure first enunciated by this Court in an admiralty suit. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932). The question here is not when state courts may close their own doors to federal claims, *Missouri v. Mayfield*, 340 U.S. 1 (1950), but rather when state courts *must* apply a doctrine characteristic of the general maritime law, even when application of the doctrine may result in the state court closing its doors to a maritime suit.

It would be an abuse of discretion for *any* district court to decline to enforce the doctrine of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Piper v. Reyno*, 454 U.S. 235 (1981), when applicable. These cases mandate that some cases simply not be tried in the forum selected by plaintiff if the stated factors require adjudication elsewhere.

In *Testa v. Katt*, 330 U.S. 386 (1947), the United States Supreme Court held that state courts which lacked jurisdiction under state law to hear federal claims could be required by federal law to hear them nonetheless. The converse is equally true. In a maritime case where under *Gulf Oil* and *Piper* a federal court sitting in a given district could not hear the case, a state court likewise should be required to apply the doctrine and dismiss.

The existence of a state open-forum statute does not alter the result. A state legislature lacks power to keep state courts open to hear claims for which they have been deprived of jurisdiction by federal law. *See The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867); *The HINE v. Trevor*, 71 U.S. (4 Wall.) 555 (1867); *Lindgren v. United States*, 281 U.S. 38, 47 (1930); *Southland*, 465 U.S. at 15-16. In enacting the "saving to suitors" clause, Congress granted state courts "partially concurrent" jurisdiction to hear some admiralty suits. *Knickerbocker Ice*, 253 U.S. at 161. But, Congress quite clearly never intended that state courts should exercise greater jurisdiction in maritime cases than the federal courts sitting in the state.

## CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: June 29, 1992

Respectfully submitted,

/s/ LIZABETH L. BURRELL
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*Counsel of Record*

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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On June 29, 1992, I served the within *Amicus Curiae* Brief in Support of the Petition for a Writ of Certiorari in re: "American Dredging Company v. William Robert Miller" in the United States Supreme Court, October Term 1991, No. 91-1950, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully pre-paid, in a United States post office mail box at New York, New York, addressed as follows:

Timothy J. Falcon, Esq.,
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All Parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 29, 1992 at New York, New York.

LIZABETH L. BURRELL
Lizabeth L. Burrell

**Decisions**

PAGE

*Quintero v. Klaveness Ship Lines*,
914 F.2d 717 (5th Cir. 1990),
*reh'g denied, en banc*, 920 F.2d 931 (5th Cir. 1990),
*cert. denied*, 111 S. Ct. 1322 (U.S. 1991) ..... 20

*Romero v. International Terminal Operating Co.*
358 U.S. 354, 79 S. Ct. 468, (1959),
*reh'g denied*, 359 U.S. 962, 79 S. Ct. 795 (1959) ..... 12

*Sherrill v. Brinkerhoff Maritime Drilling*,
615 F. Supp. 1021 (N.D. Cal. 1985) ..... 17, 29

*Sibaja v. Dow Chemical Co.*,
757 F.2d 1215 (11th Cir. 1985),
*reh'g denied, en banc*, 765 F.2d 154 (11th Cir. 1985),
*cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) ..... 21

*The Steamer St. Lawrence*,
66 U.S. (1 Black) 522 (1862) ..... 10

*Symeonides v. Cosmar Compania Naviera, S.A.*,
433 So. 2d 281 (La. App. 1st Cir. 1983),
*cert. denied*, 440 So. 2d 731 (La. 1983),
*cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984) ..... 21

*Szumlicz v. Norwegian American Line, Inc.*,
698 F.2d 1192 (11th Cir. 1983) ..... 17

*Vargas v. M/V MINI LAMA*,
709 F. Supp. 117 (E.D. La. 1989) ..... 17, 29





**Decisions**

PAGE

*Villar v. Crowley Maritime Corporation*,
780 F.Supp. 1467 (S. D. Tex. 1992) ..... 20

*Washington v. W. C. Dawson & Co.*,
264 U.S. 219, 44 S. Ct. 302 (1924) ..... 8, 12,13

*Willendson v. Forsoket*,
29 F. Cas. 1283 (D. Pa. 1801) ..... 14

*Zipfel v. Halliburton Co.*,
832 F.2d 1477 (9th Cir. 1987),
*cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988),
*reh'g denied*, 487 U.S. 1245,
109 S. Ct. 2 (1988) ..... 17,20,30

**Statutes**

PAGE

28 U.S.C.A. § 1257 (West Supp. 1992) ..... 1

28 U.S.C.A. § 1333 (1949) ..... 2, 7

Anti-Injunction Act, 28 U.S.C. § 2283 ..... 18

Death on the High Seas Act
46 U.S.C.A. §§ 761, 767 ..... 11

Fed.Rules Civ.Proc.Rules
1-86, 28 U.S.C.A. ..... 25

**Statutes**

PAGE

Federal Employer's Liability Act,
45 U.S.C.A. § 51 *et seq* ..... 24

Jones Act 46 U.S.C.A. § 688
(1920 and West Supp 1992) ..... 4,24

Judiciary Act of 1789, Ch. 20
1 Stat. 73, 76, 77, Comp. Stat.
§§ 530, 991: Sec. 9 (Sept. 24, 1789) ..... 12, 23

La Code Civ. Proc. Art. 123 (West Supp. 1992) ..... 3,22,23

U. S. Const., Art. III, Sec. 2, Cl. 1 ..... 2, 9

**Treatises and Other Authorities**

PAGE

A. Bickel, "*Forum Non Conveniens* on Admiralty,"
35 Cornell L. Quarterly 12, 17 (1949) ..... 24

Alexander Hamilton, *The Federalist*
No. 80 at 478 ..... 9

Baer, *Admiralty Law of the Supreme Court*,
§ 17-2, p. 488 (3d ed. 1979) ..... 17

Friedell, *Benedict on Admiralty*,
1 §§ 105, 121, 122, 129
pp. 8.41 - 8.57 (7th ed. 1991) ..... 17





**Treatises and Other Authorities**

PAGE

Gilmore & Black, *The Law of Admiralty*
§ 1-19, pp. 51-52 (2d ed. 1975) ..... 17

Healy & Sharp, *Admiralty Cases & Materials*
Ch. 2, Section F, pp. 157-162 (2d ed. 1986) ..... 17

Joseph Story, *Commentaries on the Constitution of the United States* (Book III), 529, 530
( L.W. Levy ed. 1970 ) ..... 9

James Madison
"Vices of the Political System
of the United States,"
*The Writings of James Madison* (Vol. 2)
(G. Hunt ed. 1901) pp. 361-369, at 362 ..... 9

James Madison, Letters to Edmund Randolph
and George Washington, dated April 8 and 16, 1987,
respectively,
*The Writings of James Madison* (Vol. 2)
(G. Hunt. ed 1901) ..... 9

Schoenbaum, *Admiralty and Maritime Law*,
§§ 5-8, 8-8, 13-9, 20-6, 11,
pp. 189, 270, 477, 478, 639, 651-653 (1987). ..... 17

## OPINIONS BELOW

All opinions below are contained in the Joint Appendix. The opinion of the trial court, the Civil District Court for Orleans Parish in Louisiana, is reproduced in the Joint Appendix, pp. 51, 52. Its judgment, dismissing the suit on the basis of petitioner's exception and maritime defense of *forum non conveniens*, appears in the Joint Appendix, pp. 49, 50. The opinion of the Louisiana Fourth Circuit Court of Appeal, affirming the trial court judgment, is reported at *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991) and is reproduced in the Joint Appendix, pp. 53-57. The Louisiana Supreme Court's opinion, reversing the appellate court and the trial court judgments, is reported at *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). It is reproduced in the Joint Appendix, pp. 58-67.

## JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court was entered on March 2, 1992. The petition for certiorari was filed on May 29, 1992 and this Court granted certiorari on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West Supp. 1992).



## CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a state and Citizens of another state; between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C.A. § 1333 (1949), commonly known as the "saving to suitors" clause, provides as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Louisiana Code of Civil Procedure Article 123 provides as follows:

> A.For the convenience of the parties and witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B.Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C.The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C.A. § 688 (1920 and West Supp. 1992) or federal maritime law.



## STATEMENT OF CASE

William Robert Miller, Sr., petitioner, is a resident of Mississippi. In August of 1987, he moved to Pennsylvania where he joined the Union of Operating Engineers, Local 25 in Philadelphia, Pennsylvania. Through the union, he was hired by American Dredging Company ("American Dredging") to work aboard the Tug JOHN R in the Delaware River. American Dredging is a Pennsylvania corporation with its principal place of business in Camden, New Jersey, which is located just across the Delaware River from Philadelphia. (J.A. 8, 13, 32, 53, 58).

This action arises out of an accident allegedly sustained by Mr. Miller aboard the Tug JOHN R amid operations in the Delaware River off Marcus Hook, Pennsylvania, on December 12, 1987. (J.A. 8, 12, 53, 58). The Tug JOHN R does not now nor has it ever navigated in Louisiana waters. The situs of the vessel's operations is the Delaware River near Camden, New Jersey, where the vessel can be available for inspection during discovery, if necessary. (J.A. 13, 53, 54).

Mr. Miller was initially treated at Sacred Heart Medical Center in Chester, Pennsylvania. Subsequently, he was treated at the Hospital for Joint Diseases Orthopedic Institute located in New York City. In February of 1988, Mr. Miller returned to Mississippi where he has been treated by other physicians. (J.A. 32, 53, 58).

On December 1, 1989, Mr. Miller filed this suit against American Dredging in Louisiana state court, the Civil District Court for the Parish of Orleans. (J.A. 1, 7-9). American Dredging filed exceptions, challenging personal jurisdiction and requesting a dismissal pursuant to the doctrine of *forum non conveniens*. (J.A. 1, 10, 11). On September 21, 1990, the exceptions were heard. On September 25, 1990, District Judge Fedoroff entered his reasons for judgment and expressly concluded as follows:

> It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse [*sic*] sort.
>
> (J.A. 52)

Following federal maritime authority, the trial court dismissed the action subject to the right of the claimant to proceed in Pennsylvania.[1] (J.A. 49, 50).

On October 26, 1990, plaintiff filed a motion for suspensive appeal. On November 8, 1990, the appeal order was signed

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[1] The defendant has waived any claim that the suit is time-barred should the plaintiff bring the action in a Pennsylvania court of competent jurisdiction.



by Judge Fedoroff. On May 6, 1991, the Louisiana Fourth Circuit Court of Appeals heard argument. (J.A. 2, 3). In its decision of May 30, 1991, the Fourth Circuit affirmed the decision of the lower court, holding that the dismissal was proper under the admiralty doctrine of *forum non conveniens*. *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991). (J.A. 53-57). The appellate court specifically held as follows:

> In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navigated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

*Miller*, 580 So. 2d at 1093; (J.A. 56, 57).

On June 28, 1991, Mr. Miller petitioned the Louisiana Supreme Court to review the decision of the Fourth Circuit Court of Appeals. By order dated October 18, 1991, the Louisiana Supreme Court granted the writ to review the decision of the Fourth Circuit. (J.A. 4, 5). On March 2, 1992, the Louisiana Supreme Court reversed the decision of the trial and appellate courts, declining to apply the doctrine of *forum non conveniens* to the state court action. *Miller v. American Dredging Co.*, 595

So. 2d 615 (La. 1992). (J.A. 6, 58-67). Relying upon federal diversity cases, the Court concluded that it could apply Louisiana procedural law, which only recognizes *forum non conveniens* dismissals in non-maritime cases.

American Dredging filed its petition for certiorari on May 29, 1992, and the Supreme Court granted the petition on April 19, 1993.

## SUMMARY OF THE ARGUMENT

The question presented herein is whether the admiralty doctrine of *forum non conveniens* is applicable to maritime actions filed in state courts pursuant to the "savings to suitors" clause. 28 U.S.C.A. § 1333 (1949). Petitioner, American Dredging Company ("American Dredging"), respectfully urges that the trial court and Louisiana Fourth Circuit Court of Appeals correctly applied this admiralty doctrine, rather than state procedural law, to these maritime claims. William Robert Miller was not a resident or a citizen of Louisiana. His injury occurred on the tug on the Delaware River while he was a Pennsylvania resident, a member of a Pennsylvania union and employed by a Pennsylvania corporation. The doctrine was correctly applied by the trial court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981).

Petitioner respectfully submits that the doctrine of *forum non conveniens* is a characteristic feature of admiralty which has modulated this discretionary exercise of admiralty jurisdiction in a fashion commensurate with the Constitutional protection of maritime commerce. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885); *Canada Malting Co. v. Paterson S.S. Ltd.*, 285 U.S. 413, 52 S. Ct. 413 (1932).



The discretionary nature of the doctrine complements the Constitutional goal of admiralty to protect and promote maritime commerce. *Piper, supra*; *The Lottawanna*, 88 U.S. (21 Wall) 558, 574 (1875); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302 (1924). It accords appropriate deference to the plaintiff's choice of forum while mandating consideration of an alternate suitable forum and balancing private and public factors, all of which bear upon the determination of the proper forum for a fair and convenient resolution of the dispute. *Piper, supra*; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947); *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947). As a doctrine which protects the rights of all litigants to an adjudication of their dispute in a forum convenient to the dispute at hand, the parties, the witnesses and the other source of proof, the application of *forum non conveniens* in admiralty cannot be evaded by reference to state procedural rules under the guise of the "reverse-*Erie*" concept. Compare *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942).

*Forum non conveniens* is a fundamental part of the admiralty which provides protection of maritime commerce against vexatious or harassing litigation in inconvenient fora detrimental to the goals of uniformity of maritime law. In the instant matter, the Civil District Court for Orleans Parish, State of Louisiana correctly applied this admiralty doctrine, dismissing these maritime claims subject to their adjudication in Pennsylvania.

## ARGUMENT

Petitioner, American Dredging Company (American Dredging), respectfully submits that the doctrine of *forum non conveniens* is an integral feature of admiralty which merits

application to all maritime cases. The doctrine's central focus upon the convenience of the parties and the court promotes a central theme and recurring goal of maritime law - the convenient (efficient, economical and fair) resolution of maritime disputes between distant parties engaged in maritime commerce.

## I.

## The General Maritime Law of the United States is Applicable to All Cases of Admiralty Jurisdiction

The Constitution, which explicitly extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction" is the source of authority for the development of the general maritime law of the United States. U. S. Const., Art. III, Sec. 2, Cl. 1. *The Lottawana*, 88 U.S. (21 Wall) 558, 575 (1875); *Butler v. Boston Steamship Co.*, 130 U.S. 527, 556-557,9 S. Ct. 612 (1889). This endowment of judicial authority is the only instance in which the Constitution grants jurisdiction over a specific area of substantive law.[2] The framers of the Constitution placed this authority in the national courts in recognition that protectionism of local interests by state laws and state courts was potentially devastating to the maritime commerce important to the new nation.[3] The Constitution therefore

[2] *See:* U. S. Const., Art. III, generally.

[3] *See, e.g.* James Madison, "Vices of the Political System of the United States," *The Writings of James Madison* (Vol. 2) (G. Hunt ed. 1901) pp. 361-369, at 263. Letters to Edmund Randolph and George Washington, dated April 8 and 16, 1987, respectively, *Id* at 336-340, 339; 344-352, 347; A. Hamilton, *The Federalist*, No. 80 at 478; 3 Joseph Story, *Commentaries on the Constitution of the United States* , §1662 at 529-530 (L. W. Levy Ed., 1970)



explicitly recognized authority of the national judiciary over all cases of admiralty and maritime jurisdiction.

In furtherance of its Constitutional authority, the Supreme Court has played the leading role in the definition of the breadth of admiralty jurisdiction and in the formulation of the general maritime law of the United States. Admiralty jurisdiction was interpreted broadly, and early federal decisions held that the "admiralty and maritime" jurisdiction would neither be circumscribed by the narrow rules of English common law nor be bound to follow principles of English admiralty courts. *DeLovio v. Boit*, 7 F. Cas. 418, (C.C.D. Mass., 1815); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852). As to admiralty jurisdiction, this Court has indicated the Constitutional reach of admiralty is a matter of judicial cognizance which neither Congress nor the states can modify by legislation. *Crowell v. Benson*, 285 U.S. 22, 54-55, 52 S. Ct. 285, 294 (1932); *The Lottawana*, 88 U.S. at 558; *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1862) (*dictum*); *Butler*, 130 U.S. at 557 (*dictum*).

Beyond matters of jurisdiction, this Court has played the paramount role with Congress in the development of the general maritime law. Simultaneously with the broad interpretation of admiralty jurisdiction, the United States developed "a maritime law of our own." *The Lottawana*, 88 U.S. (21 Wall) 558, 574 (1875). As articulated in *The Lottawana*, the Constitutional grant of judicial power over admiralty cases mandates the application of a uniform system of maritime law:

> One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with and operating uniformly in the

> whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States.

*The Lottawana*, 88 U.S. (21 Wall.) at 575.

The role of the Court in the development of uniform principles of admiralty remains evident in the Court's modern decisions in admiralty matters. *See, e.g. Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 325-328 (1990), restoring a uniform rule for wrongful death actions by the survivors of seamen; *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 2494-2500 (1986), upholding a uniform application of the Death on the High Seas Act, 46 U.S.C.A. §§ 761, 767; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970), overturning its early holding in *The Harrisburg* 119 U.S. 199, 7 S.Ct. 140 (1886) and recognizing a maritime wrongful death action for maritime workers in U.S. waters; *Kemarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-632, 79 S. Ct. 406 (1959), formulating a uniform liability standard with respect to non-crewmembers aboard vessels.

The national authority of the Supreme Court and Congress is paramount in the development of maritime law. Under our federal system, the states exercise a concurrent and complementary role. In the Judiciary Act of 1789, the first Congress recognized the jurisdiction of state courts to provide common



law remedies over matters which also fall within the admiralty jurisdiction of the United States.[4] Pursuant to this "concurrent jurisdiction," the states may adjudicate *in personam* claims cognizable in admiralty, and state laws may even supplement admiralty principles within certain limitations. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S. Ct. 468, 480 (1959). While the extent of permissible "supplementation" is difficult to define with precision, the Court has held that state laws and jurisprudence may not be applied in a fashion which would "contravene the essential purposes of, or . . . work material injury to of such [general maritime] law or interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 40 S. Ct. 438, 440 (1920); see also *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886 (1961); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942). As noted in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302 (1924), state laws, even when made applicable to admiralty through Congressional enactment, may not be applied in a fashion which would disrupt the uniformity of the general maritime law:

> To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of

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[4] The original statute granted federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, Ch. 20. 1 Stat. 73, 76, 77, Comp. Stat. §§ 530, 991: Sec. 9 (Sept. 24, 1789).

> course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme.

*Washington*, 264 U.S. at 228.

## II.
## The Doctrine of *Forum Non Conveniens* Is an Essential and Characteristic Feature of Admiralty Jurisdiction

The doctrine of *forum non conveniens* is the legal principle which governs the discretionary exercise of jurisdiction in cases where the forum chosen by the plaintiff may be inconvenient for fair and efficient resolution of the dispute at issue. Pursuant to this doctrine, the trial court may in its discretion retain jurisdiction over the action or dismiss the case subject to protecting the right of the plaintiff to proceed in a convenient alternative forum. In its present form, the doctrine provides the discretionary guidelines which accord appropriate deference to the plaintiff's choice of forum while ascertaining the availability of an alternate forum and examining various private and public factors affecting the convenient resolution of the dispute at issue. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981).

The modern exposition of the doctrine of *forum non conveniens* is articulated in three non-maritime cases. *Piper, supra*; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947); *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947). The roots of this doctrine,



however, are firmly grounded in the discretionary exercise of admiralty jurisdiction. See, e.g. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885); *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 50 S. Ct. 400 (1930); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 52 S. Ct. 413 (1932); *Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682). As noted in Justice Black's dissent to the importation of this doctrine into common law, the power to decline the exercise of jurisdiction relates to "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity . . ." *Gilbert*, 330 U.S. at 513.

As early as 1804, Chief Justice Marshall, sitting as Circuit Judge, discussed the discretionary jurisdiction of admiralty in a salvage case involving a French ship saved by British vessel and brought into an American port. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804). Although neither litigant had objected to the proceedings, the Court made the following observation about the jurisdiction of the admiralty court:

> In this case, a preliminary question has been made, by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested except the owners of the cargo of the Firm, are not Americans, a doubt has been suggested, respecting the jurisdiction of the court, and upon a reference to authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. *On weighing the considerations drawn from public convenience,*

> *those in favor of the jurisdiction, appear much to overbalance those against it*, and it is the opinion of this court, that, whatever doubts may exist in a case, where the jurisdiction may be objected to, there ought to be none where the parties assent to it.

*Mason*, 6 U.S. at 264. (Emphasis added.)

In *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885), this Court examined the exercise of jurisdiction in a case involving a high seas collision between a Norwegian bark and a Belgian steamship. The Court enumerated various considerations affecting its exercise of jurisdiction, including the nationality of the parties, location of the tort, location of the *res*, convenience of the parties, treaty provisions, choice of law, etc. *Belgenland*, 114 U.S. at 361-368. The Court's approval of the exercise of jurisdiction implicitly recognized the underlying discretion of the admiralty court to decline jurisdiction on the basis of these factors. *The Belgenland*, 114 U.S. at 367, 368.

This discretion was again recognized by this Court in the *Canada Malting Co. v. Paterson Steamships S.S. Ltd.*, 285 U.S. 413, 52 S.Ct. 413 (1932), and *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 50 S.Ct. 400 (1930). In *Canada Malting*, Justice Brandeis explicitly upheld the discretion of the trial court to decline jurisdiction even though the collision occurred in United States waters and regardless of whether United States law would have been applicable to the action in U. S. Courts:

> The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction, and that the exercise of its



> discretion will not be disturbed unless abused. (Citations omitted.)
>
> * * *
>
> First. The contention that the jurisdiction was obligatory rests upon the fact that the collision occurred within the territorial waters of the United States. The argument is that a cause of action arising from a collision occurring on territorial waters of the United States arises out of its laws, since within its territory there can be no other law. (Citations omitted.)
>
> * * *
>
> We have no occasion to inquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.

*Canada Malting*, 285 U.S. at 418-420.

This Court's recognition of this doctrine in admiralty and has been followed by lower federal courts which have often applied this doctrine to choice of forum issues in maritime cases.[5] Likewise, *forum non conveniens* is recognized by the

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[5] *Ikospentakis v. Thalassic S. S. Agency*, 915 F.2d 176 (5th Cir. 1990), *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *Exxon v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988), *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983); *De Mateos*

(Continued on next page)

principal treatises on admiralty as an established principle of maritime law.[6]

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(Continued from previous page)

*v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S. Ct. 1449 (1978); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D. C. Cir. 1980) (involving claims under the Death on the High Seas Act relating to the helicopter crash into North Sea; *Gonzalez v. Naviera Neptumo A.A.*, 832 F.2d 876 (5th Cir. 1987); *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983); *Vargas v. M/V MINI LAMA*, 709 F. Supp. 117 (E.D. La. 1989); *Pastewka v. Texaco, Inc.* 565 F.2d 851 (3d Cir. 1977); *Gazis v. John S. Latsis Inc.*, 729 F. Supp. 979 (S.D. N.Y. 1990); *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985); *cf. Hernandez v. Cali, Inc.*, 32 A.D.2d 192 (N.Y. App. Div. 1969). While recognition of this doctrine has been largely uniform among the circuits, a few courts have suggested that when American law is applicable a *forum non conveniens* dismissal is improper since it would undermine the application of U. S. law. See: *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *Fisher v. The Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816, 102 S. Ct. 92 (1981), overruled by *In re Air Crash near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). The choice of law question is not at issue in this case.

[6] Friedell, *Benedict on Admiralty*, 1 §§ 105, 121, 122, 129 pp. 8.41 - 8 57 (7th ed. 1991); Gilmore & Black, *The Law of Admiralty*, §§ 1-19, pp. 51-52 (2d ed. 1975); Baer, *Admiralty Law of the Supreme Court*, § 17-2, p. 488 (3d ed. 1979); Healy & Sharp, *Admiralty Cases & Materials*, Ch. 2, § F, pp. 157-162 (2d ed. 1986); Schoenbaum, *Admiralty and Maritime Law*, §§ 5-8, 8-8, 13-9, 20-6, 11, pp. 189, 270, 477, 478, 639, 651-653 (1987).



This Court has never considered the question presented herein - whether state courts are to apply the maritime doctrine or state procedure to admiralty cases filed in state court. In *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 108 S. Ct. 1684 (1988), the Court considered the related question of whether the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, authorized a federal court to enjoin state court consideration of a *forum non conveniens* question previously considered by the federal court. In concluding that the relitigation exception was not applicable, the Court acknowledged, without upholding, the Fifth Circuit's recognition of the preemptive effect of this admiralty doctrine. *Choo*, 486 U.S. at 150, 108 S.Ct. at 1691. The concurring opinion of Justice White also acknowledged the "substantial" federal interest in uniformity in admiralty and the potential preemptive effect of federal *forum non conveniens* rulings. *Choo*, 486 U.S. at 151; 108 S.Ct. at 1692. However, the precise issue presented here was not decided there.

The Fifth Circuit Court of Appeals has considered conflict between this doctrine and state procedure and has held that "*forum non conveniens* is `a characteristic feature' of maritime law" which state and federal courts are bound to apply in the adjudication of maritime cases. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 178-180 (5th Cir. 1990); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *see also: Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684 (1988). In *Ikospentakis*, the Fifth Circuit declined to permit a voluntary dismissal of a Jones Act federal suit because such a dismissal would have unfairly prejudiced the maritime defendant to state court litigation without safeguarding its right to a trial in a convenient forum:

> There is some irony in our conclusion. Our court has previously determined that a federal maritime

defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d at 307 (decision reversed on other grounds). We endorse that holding again. Louisiana courts have definitely refused to recognize this ruling. *Markzannes*, 545 So. 2d at 537. If there were any ambiguity in Louisiana's law, we would be inclined to enforce *Chick Kam Choo* rigorously and hold that there was no "plain legal prejudice" suffered by these appellants, because Louisiana courts must recognize the preemptive force of the federal *forum non conveniens* doctrine in this seaman's case. At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous

> rule would blink at reality and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result."

*Ikospentakis*, 915 F.2d at 180

The discretionary nature of this doctrine and the criteria considered by the trial court are exactly suited to the conflicts frequently associated with the exercise of admiralty jurisdiction over distant parties. The very nature of maritime commerce necessarily involves contacts and disputes among disparate and distant interests. The essential role of admiralty jurisdiction in protecting and promoting maritime commerce therefore recognizes and respects the rights of such distant interests to a fair and convenient resolution of their disputes. This view of admiralty



jurisdiction is reflected in the holding and language of Circuit Judge Story in *DeLovio v. Boit*:

> The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold, that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind. (Citations omitted.)

*DeLovio*, 7 F. Cas. at 443.

In absence of uniform recognition of this doctrine in admiralty matters, the current practice of multiple adjudications and extensive forum shopping will continue even after explicit adverse federal judgments.[7] It is difficult to conceive of a greater

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(Continued on the next page)

[7] *See, e.g. Villar v. Crowley Maritime Corporation*, 780 F.Supp. 1467 (S.D.Tex. 1992); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988);

impediment to maritime commerce than the unfettered exposure of distant maritime interests to multiple litigation in inconvenient fora without regard to uniform principles of admiralty.

## III.
## Application of the Doctrine of *Forum Non Conveniens* May Not Be Defeated By Mere Reference to Substance and Procedure

*Forum non conveniens* provides fundamental protection to maritime interests against unrestricted forum shopping. It is not a mere procedural device to be cast aside by state rules of practice. In the decision below and in its earlier decision of *Markzannes v. Bermuda Star Cruise Line, Inc.*, 545 So.2d 537

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*Ikospentakis, supra*, 915 F.2d at 177. *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir. 1986), *cert. denied*, 488 So. 2d 203 (La. 1986) *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So. 2d 281 (La. App. 1st Cir. 1983), *cert. denied*, 440 So. 2d 731 (La. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). *cf. Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976); *see also*: *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) and *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 671 (1991) (reflecting the practice of multiple filings in non-marine cases). See also the arduous trek of the *Choo* litigation, cited in the petition for certiorari at pp. 11, 12.



(La. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837 (1990),[8] the Louisiana Supreme Court concluded that Louisiana courts were free to apply Louisiana procedure[9] rather than the doctrine of *forum non conveniens* to maritime suits filed in state court. American Dredging respectfully submits that this conclusion is incorrect.

The Louisiana Court premised its ruling on the conclusion that *forum non conveniens* concerns "only" the convenience of the maritime defendant which does not "rise to a level of a substantial right." *Miller*, 595 So.2d at 619. (J. A. 66). This conclusion overlooks the critical importance of convenience to maritime commerce and its significance to maritime law[10] and further ignores this Court's recognition of the significance of convenience even in a non-maritime setting. *Reyno*, 454 U.S. at 256; 102 S. Ct. at 266.

It would be a most unfortunate anomaly if the Constitutional protection of maritime commerce could be summarily defeated by the simple expedient of filing in state court, while

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[8] In *Markzannes*, the Louisiana Court overturned the application of *forum non conveniens* and applied local procedure to a claim by a Greek seaman who was injured aboard a Panamanian cruise vessel en route between Bermuda and Boston. *Markozannes v. Bermuda Star Line*, No. 88-C-2440 (La. App. 4th Cir. March 20, 1989 and April 19, 1989), reproduced in the Joint Appendix, pp. 23-30, *rev'd.* 545 So.2d 537 (La. 1989).

[9] Article 123 of the Louisiana Code of Civil Procedure provides the state's procedural rule which permits *forum non conveniens* dismissals in non-maritime cases, but is expressly inapplicable to maritime and Jones Act cases. La C. Civ. Proc. Art. 123.

[10] *See* the language of Judge Story in *DeLovio*, cited *infra* at 19,20.

non-maritime interests have full protection to commercial convenience in diversity actions through the *Piper*, *Gulf Oil* and *Koster* decisions[11] and in state actions under La. Article 123. Petitioner respectfully urges that the concurrent jurisdiction of the Judiciary Act was never intended to permit the plaintiff to escape the application of fundamental admiralty principles articulated pursuant to this Court's Constitutional grant of authority.

American Dredging respectfully submits that the Louisiana Court erred through its myopic focus on non-maritime jurisprudence.[12] Eschewing an analysis of admiralty jurisprudence, the Louisiana Court was persuaded by federal diversity cases and consideration of the "so-called `reverse-*Erie*' doctrine." *Miller*, 595 So.2d at 618 (J.A.65). Without any consideration of the relationship of this doctrine to maritime law, the *Miller* Court inferred that *forum non conveniens* was mere federal procedure. In place of maritime authority, the Louisiana Court relied, *inter alia*, upon this Court's decision in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950). In *Mayfield*, this Court considered whether a Missouri state court in adjudicating railroad worker claims was bound by the federal

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[11] *Cf. Davis v. Farmers' Co-Op Equity Co.*, 262 U.S. 312, 316-318, 43 S.Ct. 556, 558 (1923), noting limitations on state jurisdictional statutes based in part, upon commercial convenience with respect to interstate operations protected by the commerce clause.

[12] The Louisiana Court's analysis in *Miller* is contrasted with its analysis in *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 640-644 (La 1992) wherein the Louisiana Supreme Court reviewed the maritime jurisprudence and scope of uniformity before determining that Louisiana local interests warranted application of a Louisiana strict liability standard to a helicopter crash. In the instant case, there are no local interests to be protected by Louisiana's non-maritime procedure.



rule of *forum non conveniens*.[13] This Court held that the state courts were free to apply or not apply this principle according to local law. *Mayfield*, 340 U.S. at 5, 71 S. Ct. at 3. The *Miller* Court was then persuaded to apply its local procedure because "the Jones Act is based upon and incorporates by reference the FELA." *Miller*, 595 So.2d at 618; (J.A. 63, 64).

The decision in *Mayfield*, though simple and clear, is inapposite here. Neither the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* nor the underlying claims of railroad workers involve Constitutional issues of admiralty jurisdiction or uniform maritime law. While it is true that the Jones Act (46 U.S.C. § 688) incorporates the FELA liability standards, the incorporation of that standard did not thereby undermine the Constitutional premise of admiralty jurisdiction or eradicate uniform principles of admiralty. Congress did not unwittingly destroy the uniformity of admiralty protected by the Constitution by adopting for seamen the liability standard applicable to railroad workers.

The supplantation of maritime law can not be sustained by mechanical reference to concepts of substance and procedure. *Forum non conveniens* is not a mere procedural device so disconnected from admiralty jurisdiction that it becomes inapplicable under a "reverse-*Erie*" analysis. The "*forum non conveniens* problem . . . is inescapably connected with the substantive rights of the parties in any given type of suit, rather than being `merely' an `administrative' problem." A. Bickel, *Forum Non Conveniens in Admiralty*," 35 Cornell L. Quarterly

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[13] *Forum non conveniens* had not long before been incorporated into common law in the 1947 decisions in *Gilbert* and *Koster*, *supra* at 13,14.

12, 17 (1949). The question presented here is not solved by the so-called "reverse-*Erie*" formula. The jurisprudential reference to "reverse-*Erie*" stems from considerations of parallel, though not altogether symmetrical or reciprocal, principles involving the uniformity doctrine of admiralty, the "savings to suitors" clause and the *Erie* doctrine.[14] The uniformity doctrine mandates that admiralty principles be applied uniformly by all federal and state courts. The "savings to suitors" clause allows maritime claimants access to state courts without infringing upon those uniform principles. The *Erie* doctrine mandates that state substantive principles be applied by federal courts in diversity cases. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). The "reverse-*Erie*" concept is no doctrine at all, but a handy metaphor to recognize the potential application of federal or state procedure when not in conflict with controlling principles.[15]

The "reverse-*Erie*" metaphor cannot provide a mechanical answer by facile reference to concepts of "substance" and "procedure." Legal principles do not always fall exactly into such finite categories. *Forum non conveniens* has been an established feature of admiralty since long before the articulation of the *Erie* doctrine or the enactment of federal procedural rules.[16] The nominal analysis of the *Miller* Court overlooks the reality that many fundamental principles of admiralty, while

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[14] See the discussion of the Fifth Circuit in *Exxon*, 817 F.2d at 319.

[15] The *Miller* Court's reference to this Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986), seems particularly inapposite. Nothing in *Tallentire* warrants the disavowal of such a deeply-rooted admiralty principle in favor of a local procedural rule

[16] Fed. Rules Civ. Proc. Rules 1-86, 28 U.S.C.A.



affecting procedure, are nonetheless characteristic features which make admiralty a distinct and unique body of law. For example, maritime law's protection of seamen finds direct expression in legal rules which govern procedural questions of burden of proof and sufficiency of evidence. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961). The rules are no less applicable in state court because they impact and conflict with state procedural rules. *See, e.g. Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 1122-1123 (La. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989); *Bennett v. Sedco Maritime*, 520 So. 2d 894, 905 (La. App. 3d Cir. 1987).

In *Garrett*, this Court upheld the application of the admiralty burden of proof rule and overturned the decision of the Pennsylvania Supreme Court, which held the issue was procedural and controlled by state law. *Garrett*, 317 U.S. at 243, 244; 63 S. Ct. at 249, 250. This Court noted that the "deeply rooted" admiralty rule regarding burden of proof was a part of the very substance of [the seaman's] right and [could] not be considered a mere incident of a form of procedure." *Garrett*, 317 U.S. at 252, 253. The language of Justice Black regarding the interplay of admiralty law and state practice is particularly apposite:

> It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or *in personam* such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. *If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would*

> *actually deny, federal rights* which Congress, by providing alternative remedies, intended to make not less, but more secure. (Emphasis added.)

*Garrett*, 317 U.S. at 245.

This is not to say that state interests are not relevant and may not be considered. The doctrine is, by nature, a discretionary function of the local court and consideration of relevant public and private factors is mandated by the *forum non conveniens* process. Therefore, in cases where the state has significant interest in the dispute, the discretionary balance will undoubtedly weigh in favor of retaining jurisdiction. However, in cases such as this one where there is no such interest, the trial court in its discretion may dismiss the litigation subject to guaranteeing the claimant's right to an adjudication in a suitable forum.

The doctrine of *forum non conveniens* protects the legitimate rights of all maritime litigants. It accords appropriate deference to the maritime suitor's choice of forum while protecting the maritime defendant from exposure to an unreasonable, vexatious and oppressive forum selection and allowing the trial court to consider public or local interests in the dispute. American Dredging respectfully submits that this important protection of the rights of all maritime litigants cannot be defeated as a mere matter of procedure.

## IV.
## Application of *Forum Non Conveniens* May Not Automatically Be Defeated By Reference to Applicable Law or Citizenship of the Parties

The doctrine of *forum non conveniens* provides a "flexible" discretionary basis for determination of the appropriate



forum for adjudication of disputes. *Piper*, 454 U.S. at 251, 102 S. Ct. at 263. Under its guidance, the trial court first determines the availability of an alternate forum and then examines the private and public factors articulated in *Gilbert* and *Koster* to determine whether to adjudicate the dispute in the plaintiff's chosen forum or dismiss the claim subject to adjudication in an alternate convenient forum. *Piper*, 454 U.S. at 249-257, 102 S.Ct. at 262-267.

This doctrine guides the trial court through its forum analysis and expressly avoids rigid mandatory rules for the determination of the proper forum. Issues such as the applicable law and citizenship of the parties, while relevant to the analysis, are not dispositive of the discretionary process. *Piper*, 454 U.S. at 248-250; 102 S.Ct. at 262, 263. The *Piper* Court upheld these discretionary principles, relying in part upon its admiralty decision in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 52 S.Ct. 412 (1932). *Canada Malting* involved a maritime collision dispute between Canadian claimants. The Court upheld the discretionary dismissal of the suit even though the collision occurred in U.S. territorial waters and although the U.S. courts might have applied U.S. law. *Canada Malting*, 285 U.S. at 420. The libellant sought to overturn the dismissal on grounds that since the incident was governed by U.S. law, jurisdiction was mandatory. The Court expressly disavowed this contention:

> We have no occasion to inquire by what law the rights of the parties are governed, as we are of the opinion that, *under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.* (Emphasis added.)

*Canada Malting*, 285 U.S. at 419, 420; 52 S.Ct. at 414.

Following the *Canada Malting* holding, the *Piper* Court held that the possibility of a change in the applicable law unfavorable to the claimant would not automatically defeat the defendant's *forum non conveniens* motion. *Piper*, 454 U.S. at 247, 102 S.Ct. at 261. The Court stated that such a rigid rule would render the doctrine " virtually useless" and prevent the very protection it was designed to afford. *Piper*, 454 U.S. at 250, 102 S. Ct. at 263. The discretionary forum analysis likewise considers the citizenship and residence of the parties. The claimant's choice of "home forum" is given substantial deference, but not dispositive weight. *Koster*, 330 U.S. at 524, 525, 67 S.Ct. at 831, 832; *Piper*, 454 U. S. at 255, 102 S. Ct. at 265, 266. As stated by Justice Marshall in *Piper*, "[c]itizens or residents of the forum deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper*, U.S. at 255; S.Ct. at 266, n. 23.

Following the *Piper* standard, lower federal courts have held that the application of United States or local law by the plaintiff's chosen forum (or a possible adverse change in applicable law) is not dispositive of the forum analysis. *In re Aircrash near New Orleans*, 821 F.2d 1141, 1165 (5th Cir. 1987) (*en banc*); *Ali v. Offshore Co., Inc.*, 753 F.2d 1327, 1333 (5th Cir. 1985); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983); *Sherrill v. Binkerhoff Marine Drilling*, 615 F.Supp. 1021, 1033-1035, (C.D. Cal. 1985); *Vargas v. M/V MINI LAMA*, 709 F.Supp. 117, 118 (E. D. La. 1989); *Gazis v. John S. Latsis, Inc.*, 729 F. Supp. 979, 986-988 (S.D.N.Y. 1990). A few earlier decisions also recognized this rule, relying upon *Canada Malting* and other authorities. *See, e.g.*: *Fitzgerald v. Texaco*, 521



F.2d 448 (2d Cir. 1975), *cert. denied* 433 U.S. 1052, 96 S.Ct. 781 (1976); affirming dismissal even though foreign law may be less favorable to claimants; *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983), remanding for possible dismissal even though U. S. law (COGSA) applicable; *Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*), upholding the dismissal even though the foreign forum law would allow a lesser recovery. A few decisions have held that in Jones Act cases, a *forum non conveniens* dismissal was prohibited when the seaman claimant would be relegated to a foreign (non-United States) forum and thereby be denied a Jones Act remedy. *Zipfel v. Halliburton Co.*, 832 F.2d 1147, (9th Cir. 1987), *cert. denied* 486 U.S. 1054, 108 S.Ct. 2819 (1988); *Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752, 758 (C. D. Cal. 1983); *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977) (*dictum*); *see also* the Fifth Circuit cases of *Fisher v. Agios Nicoloas V*, 628 F.2d 308 (1980) and *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, 1017-1018 (5th Cir. 1981) which were overruled in *Aircrash*, 821 F.2d at 1163, 1164, to the extent that they automatically prohibited *forum non conveniens* dismissal.

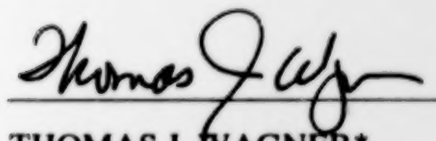
In the instant case, the applicable law - the Jones Act and the general maritime law - will be applied whether this action is litigated in Louisiana or in the convenient Pennsylvania forum. Mr. Miller did not sue in his home forum, and there is absolutely no connection between Mr. Miller's claim and Louisiana. Prior to his accident, he had become a resident of Pennsylvania and had joined a Pennsylvania union. Through the union, he was employed by American Dredging, a Pennsylvania corporation. He was assigned the Tug JOHN R operating on the Delaware River, the boundary between New Jersey and Pennsylvania. The subject injury occurred aboard the tug on the Delaware River off Marcus Hook, Pennsylvania. The vessel is available for inspection on the Delaware River at the situs of its operations. In no

legal or common sense can the Civil District Court of Orleans Parish of Louisiana be considered the plaintiff's "home forum." American Dredging respectfully submits that the trial court correctly recognized and applied the doctrine of *forum non conveniens* to the case at bar.

## CONCLUSION

For the foregoing reasons, petitioner, American Dredging Company, respectfully prays that the decision of the Louisiana Supreme Court be reversed and that the dismissal of this action by the trial court be reinstated.

Respectfully submitted,



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Supreme Court, U.S.
FILED
JUL 12 1993
OFFICE OF THE CLERK

(8)

No. 91-1950

In The

# Supreme Court of the United States

October Term, 1993

AMERICAN DREDGING COMPANY,

*Petitioner,*

v.

WILLIAM ROBERT MILLER, SR.,

*Respondent.*

On Writ Of Certiorari To The
Supreme Court Of The State Of Louisiana

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## QUESTION PRESENTED

May the State of Louisiana constitutionally enact a statute which prohibits the assertion of *forum non conveniens* as a defense to the Jones Act claims of an American seaman injured on an American flagged vessel, plying American waters, while employed by an American corporation, which claims are brought in Louisiana state court pursuant to the savings to suitors clause?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question presented | i |
| Table of contents | ii |
| Table of authorities | iii |
| Statement of the case | 1 |
| Summary of the argument | 4 |
| Argument | 11 |
| Conclusion | 18 |
| Relief sought | 20 |




## TABLE OF AUTHORITIES


Page

CASES:

*5801 Associates, Ltd. v. Continental Ins. Co.*, 983 F.2d 662 (5th Cir. 1993) ..... 9

*Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980) ..... 18

*Atlantic & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397 (5th Cir. 1970) ..... 9

*Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941) ..... 10, 19

*The Belgenland*, 114 U.S. 355 (1885) ..... 14

*Canada Malting Co. v. Paterson S.S. Ltd.*, 285 U.S. 413 (1932) ..... 14

*County of Riverside v. McGlaughlin*, 111 S.Ct. 1661 (1991) ..... 13

*Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) ..... 5, 12

*Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752 (C.D. Cal. 1983), *aff'd*, 771 F.2d 1277 (9th Cir. 1985) ..... 10

*Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991) ..... 19

*Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598 (5th Cir.) (en banc), *cert. denied sub nom., Fred S. James & Co. of Texas, Inc. v. Equilease Corp.*, 479 U.S. 984 (1986) ..... 9

*Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957) ..... 17

*Fox v. Board of Supervisors of Louisiana State Univ.*, 576 So. 2d 978 (La. 1991) ..... 17

TABLE OF AUTHORITIES – Continued

Page

*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1984) ..... 8

*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) ..... 10, 14, 18, 19

*Hanna v. Plumer*, 380 U.S. 460 (1965) ..... 8

*In re Air Crash Disaster near New Orleans, Louisiana*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated sub nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated*, 883 F.2d 17 (5th Cir. 1989) ..... 5, 8, 12

*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ..... 5

*Kernan v. American Dredging Co*, 355 U.S. 426 (1958) ..... 17

*La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983) ..... 5, 10

*Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 467 (1992) ..... 7, 15, 16

*Markzannes v. Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043 (1990) ..... 3

*Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804) ..... 14

*Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913) ..... 17

*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) ..... 10, 17, 18, 19

*Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992), *cert. granted*, 113 S.Ct. 1840 (1993) ..... 4



TABLE OF AUTHORITIES – Continued

Page

*Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) ..... 15

*Missouri v. Mayfield*, 340 U.S. 1 (1950) ..... 8, 16

*Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983) ..... 5

*New York v. United States*, 112 S.Ct. 2408 (1992) ..... 16

*Panama R. Co. v. Johnson*, 264 U.S. 375 (1924) ..... 18

*Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) ..... 12, 14, 15

*Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959) ..... 17

*Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985) ..... 8

*Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 (1958) ..... 18

*Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983) ..... 5

*Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1366 (1993) ..... 9

*Trans Orient Navigational Co. v. M/S SOUTH WIND*, 788 F.2d 288 (5th Cir. 1986) ..... 10

*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Zim Israel Navigational Co. v. Special Carriers, Inc.*, 800 F.2d 1392 (5th Cir. 1986) ..... 10

*Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *modified*, 861 F.2d 565 (9th Cir.), *cert. denied sub nom., Crowley Maritime Corporation v. Zipfel*, 486 U.S. 1054 (1988) .....5, 10, 11, 12, 18

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend. V ..... 6

U.S. CONST. amend. VII..... 15

U.S. CONST. amend. X ..... 16

STATUTES:

La. Code Civ. Pro. Ann. art. 7 (West 1960 & Supp. 1993)..... 3

La. Code Civ. Pro. Ann. art. 123 (West 1960 & Supp. 1993) .....6, 8, 16, 19

28 U.S.C. § 1333(1)..... 7

Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq*..... 10, 17, 18, 19

Jones Act, 46 U.S.C. § 688 .....10, 17

Judiciary Act of 1789, Section 9..... 7

OTHER:

Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12 (1949) ..... 14



TABLE OF AUTHORITIES – Continued

Page

Edelman, *Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517 (1984) ..... 12

Robertson and Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937 (1990) .....13, 19

Woodhouse, *Powell v Offshore Navigation, Inc.: Jurisdiction Over Maritime Claims and the Right to Trial by Jury*, 82 Colum. L. Rev. 784 (1982) ..... 7

## STATEMENT OF THE CASE

William Robert Miller, Sr., a United States citizen, worked as a merchant seaman for the majority of his adult life. For a substantial portion of his career as a seaman, Miller was a resident of the State of Louisiana. While a resident of the State of Louisiana, Miller was employed by several maritime companies operating out of Louisiana and other coastal areas of the Gulf of Mexico. In the early 1980's, Miller moved down the coast to the State of Mississippi, to a small town about an hour's drive from New Orleans, Louisiana, and continued his maritime employment. However, when there was a significant downturn in the offshore oil & gas exploration and production industry in the Gulf of Mexico region, Miller had to seek employment elsewhere. In August of 1987, Miller, a United States Coast Guard licensed vessel master (500 ton license), obtained employment with American Dredging Company through the Union of Operating Engineers, Local 25, located in Philadelphia, Pennsylvania.

Miller was employed by American Dredging Company as the master of M/V JOHN R, a tug operating in the Delaware River. While employed as the master of M/V JOHN R, Miller maintained his family's residence in Mississippi for his three minor children. During one of his hitches, Miller was injured on 12 December 1987 while aboard M/V JOHN R in the Delaware River. Miller was admitted to the Sacred Heart Medical Center in Chester, Pennsylvania on 13 December 1987, and he remained in that hospital until 23 December 1987. After his release from that facility he was treated at the Hospital for Joint Diseases Orthopaedic Institute in New York,

and, once he was able, he returned to his home on the Gulf Coast in Mississippi. Since February of 1988, Miller has been under the care of Dr. Chris Wiggins in Pascagoula, Mississippi, as well as various other physicians in the Gulf Coast area. Miller is still under the active care of his physicians along the Gulf Coast.

Miller retained local counsel and suit was filed against American Dredging Company on 1 December 1989 in the Civil District Court for the Parish of Orleans, State of Louisiana, as American Dredging Company's registered agent for service of process was located in New Orleans. The lawsuit was served upon that agent on 19 December 1989, and, as American Dredging Company was a member of the American Steamship Owners Mutual Protection & Indemnity Association, the P & I Club appointed local defense counsel to appear and defend the interests of American Dredging Company and respective underwriters.[1]

After the defendant made its appearance in the case, plaintiff served substantive written discovery upon the defendant, and defendant provided responses to these

[1] In this regard, it is quite noteworthy that the P & I Club maintains an approved list of defense attorneys, marine surveyors and other experts in various locations around the world, to defend the interests of American Dredging Company and the other Club members. Consequently, the defense of ADC's interests in this case, by the P & I Club, will not impose any hardship upon ADC.



interrogatories and requests for production of documents. Next, American Dredging Company deposed Miller, and after all of this discovery was conducted[2], ADC moved for a dismissal on the basis of lack of *in personam* jurisdiction. However, given its substantial contacts with the State of Louisiana, including the recent performance of a five million dollar dredging contract in the state,[3] the trial court specifically found that ADC's contacts with the State of Louisiana were sufficient to establish personal jurisdiction over the defendant, and the court denied ADC's motion in that regard. However, ADC also filed a motion to dismiss on the basis of *forum non conveniens*, and the trial judge granted that motion, contrary to Article 123 C of the Louisiana Code of Civil Procedure and clear precedent of the Louisiana Supreme Court. *Markzannes v. Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043 (1990).

As this *forum non conveniens* dismissal of the case of an American Jones Act seaman, injured on an American flagged vessel while working for an American company in American waters was unprecedented, Miller appealed to the Louisiana Fourth Circuit Court of Appeals.[4] However, that court simply affirmed the lower court's ruling,

[2] Under Article 7 of the Louisiana Code of Civil Procedure, this activity of the defendant constitutes a general appearance.

[3] Joint appendix at page 33.

[4] On the other hand, ADC did not appeal the court's finding that it was subject to the jurisdiction of the Louisiana courts. Consequently, that issue is not before the court and this conclusively demonstrates that ADC has not been haled into the Louisiana forum in violation of any constitutionally protected rights. ADC simply contends that, while it is constitutionally permissible for it to litigate in Louisiana, as it has done sixteen

so resort was had to the Supreme Court of the State of Louisiana. Recognizing that the *forum non conveniens* dismissal of this American Jones Act seaman's claim was unprecedented in the American jurisprudence, and was also proscribed by Article 123 C of the Louisiana Code of Civil Procedure and prior Louisiana Supreme Court holdings, the Louisiana Supreme Court reversed and remanded for trial. *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). After the reversal, ADC sought *certiorari* from this Court; *certiorari* was granted on 19 April 1993.[5]

## SUMMARY OF THE ARGUMENT

It would be unprecedented in the American jurisprudence for this court to allow the *forum non conveniens* dismissal of a Jones Act suit brought by an American seaman for injuries sustained aboard an American flagged vessel plying the inland waters of the United States. The defendant has not been able to cite a single such case to this Court. Where the Jones Act applies to the claim of an American seaman, especially with respect to a domestic casualty, *forum non conveniens* is not to be considered

times before this claim, the Louisiana forum is merely "inconvenient". It is interesting that ADC did not find the forum inconvenient on the four previous occasions in which it was a plaintiff in Louisiana courts, Joint Appendix at 36, 43-44, nor did it seek *forum non conveniens* dismissals the ten other times that it was a defendant in a Louisiana court.

[5] 113 S.Ct. 1840 (1993).



as a result of the application of the Jones Act and American law.[6] While there may be a split in the circuits with respect to possible *forum non conveniens* dismissals of the claims of foreign seamen, or with respect to casualties occurring in foreign waters, there is absolutely no support for the application of this doctrine to a domestic casualty involving an American flagged vessel, an American employer and an American Jones Act seaman.

The doctrine of *forum non conveniens* is not a fundamental feature of the general maritime law, nor is it subject to constitutional protection. The constitutional protection afforded to American Dredging Company (just like any other defendant in the United States), against litigation in a forum which would "offend traditional notions of fair play and substantial justice"[7], is contained

[6] American Dredging Company has admitted in its brief that the Jones Act and United States law applies in the case *sub judice*. Brief of petitioner, p. 17, n. 5: "The choice of law question is not an issue in this case". Consequently, the sole issue in this regard is whether the *per se* rule of the Ninth, Tenth and Eleventh Circuits, or the standard of the Second and Fifth Circuits, is correct. *Compare Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1487 (9th Cir. 1987), *modified*, 861 F.2d 565 (9th Cir.), *cert. denied sub nom., Crowley Maritime Corp. v. Zipfel*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983); *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983), *with Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983) and *In re Air Crash Disaster near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc), *vacated sub nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated*, 883 F.2d 17 (5th Cir. 1989).

[7] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

in the Due Process Clause of the Fifth Amendment to the United States Constitution. Before a court may exercise its judicial jurisdiction over a party, the court must find that the defendant has sufficient "minimum contacts"[8] with the forum to make the exercise of that jurisdiction fair and constitutionally permissible. This is a constitutional protection which attatches to every defendant in all American courts. On the other hand, *forum non conveniens* is merely a discretionary doctrine which is recognized in some jurisdictions, and not recognized in others. Additionally, even in the jurisdictions in which some form of *forum non conveniens* may be recognized, it is not applicable in all types of cases. As this doctrine is not afforded constitutional status, courts in the various States, in accordance with the precepts of federalism, are free to accept or reject this doctrine as they deem appropriate.

The Legislature of the State of Louisiana's enactment of Article 123 C of the Louisiana Code of Civil Procedure does not transgress any constitutionally protected right of American Dredging Company. American Dredging Company's constitutional objections to litigating in Louisiana were the subject of a full hearing in the district court; this was resolved adverse to ADC and it chose not to appeal.[9]

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[8] *Id.*

[9] Which is not surprising, in light of the fact that this was ADC's **seventeenth** trip to a Louisiana courthouse, with at least four of those actions being instituted by ADC. Joint appendix at 33-34, 43-44.



The "savings to suitors" clause, currently codified at 28 U.S.C. § 1333(1), has favored state courts with concurrent jurisdiction over maritime claims for over two centuries.[10] State courts have always been free to adjudicate maritime disputes[11], and the States are free to adjudicate these disputes in any fashion that does not contravene an Act of Congress or otherwise runs afoul of Constitutionally mandated protections. As has been recognized in federal diversity cases, federal courts are not *Erie*-bound to apply state *forum non conveniens* law – this is because one of the primary purposes of *forum non conveniens* is to allow a court to use this doctrine as a discretionary docket management device.[12] The same rule also applies to maritime cases brought in state courts – "reverse-*Erie*" does not require state courts to apply federal *forum non conveniens* law – the states are free to apply their own

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[10] The "savings to suitors" clause was first enacted in Section 9 of the Judiciary Act of 1789. *See Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1484 n.5 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 467 (1992).

[11] *See* Woodhouse, *Powell v. Offshore Navigation, Inc.: Jurisdiction Over Maritime Claims and the Right to Trial by Jury*, 82 Colum. L. Rev. 784 (1982).

[12] *In re Air Crash Disaster near New Orleans, La.*, 821 F.2d at 1159; *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

version of *forum non conveniens*, if any at all.[13] To argue otherwise clearly flies in the face of federalism.[14] Furthermore, the United States Supreme Court has previously ruled that the States are free to apply their own versions of *forum non conveniens*, if any, in proceedings brought in state courts.[15]

The "desire to achieve uniformity in the exercise of the maritime law" has been greatly overstated by the petitioner. In fact, a close examination of the current maritime law indicates that this rallying cry is a non-sequitur. For example, in the field of marine insurance, one which is far more international than application of

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[13] As noted in many federal decisions, *forum non conveniens* is a procedural law, and consequently, if a federal court has jurisdiction over a case, that court should apply its own *forum non conveniens* law. *In re Air Crash Disaster near New Orleans*, 821 F.2d at 1159; *Sibaja v. Dow Chemical Co.*, 757 F.2d at 1219 (1985). Federal courts apply federal procedural law, *Hanna v. Plumer*, 380 U.S. 460 (1965), and state courts apply state procedural law. Consequently, Louisiana's state courts must apply their own procedural *forum non conveniens* law to cases resolved by those tribunals.

[14] In her dissent in *Garcia v. San Antonio Metro. Transit Auth.*, Justice O'Connor noted that "The true essence of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme". 469 U.S. 528, 581 (1984) (O'Connor, J., dissenting) (emphasis in original). One of Louisiana's interests, as a state, is the management of the dockets of its courts, and a determination of which cases it will accept for adjudication. If federalism is to be more than an empty promise, the decision of the State of Louisiana, in enacting Article 123 C of the Louisiana Code of Civil Procedure, must be respected as an appropriate exercise of her State's rights.

[15] *Missouri v. Mayfield*, 340 U.S. 1, 3 (1950).



the Jones Act, there is virtually no uniformity, as this very court has stated that matters of marine insurance are the province of the States.[16] In a very recent case, the United States Fifth Circuit Court of Appeals affirmed application of Missouri insurance law to the sinking of T/B OCEAN TRANSPORTER in the Atlantic Ocean off the coast of South Carolina. Although counsel for underwriters sought application of the general maritime law, under the flag of "uniformity in the exercise of the maritime law", the court applied the state rule instead.[17] Other cases have recently reaffirmed that it is the state's province to create rules with respect to marine insurance issues.[18]

Maritime actors must also deal with the various rules of law with respect to *in rem* rights which may or may not exist in different states.[19] Shipowners are also subject to various local dock tariffs, simply by berthing their vessels.[20] Also, within the admiralty, courts often choose to apply state laws with respect to the rate of

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[16] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

[17] *See 5801 Associates, Ltd. v. Continental Ins. Co.*, 983 F.2d 662 (5th Cir. 1993).

[18] *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1366 (1993).

[19] *See Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 600-01 (5th Cir.) (en banc), *cert. denied sub nom., Fred S. James & Co. of Texas, Inc. v. Equilease Corp.*, 479 U.S. 984 (1986)(recognizing Louisiana state maritime lien, although not asserted timely).

[20] *Atlantic & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397, 401 n.16 (5th Cir. 1970).

prejudgment interest, rather than a uniform federal rate.[21]

Finally, as this is a Jones Act[22] claim, which expressly incorporates and adopts FELA[23], *forum non conveniens* cannot be applied to this Jones Act claim as the United States Supreme Court has twice ruled that *forum non conveniens* is not available as a defense to a FELA claim.[24] And, as recently noted by this court in a Jones Act case, where there is an established judicial rule attendant to FELA, the courts are not free to contravene that rule via manipulation of the general maritime law.[25] Consequently, this Court is bound by the principle of *stare decisis* to stay its course and apply the FELA rule set forth in *Gilbert* and *Kepner*.[26]

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[21] *Zim Israel Navigational Co. v. Special Carriers, Inc.*, 800 F.2d 1392, 1394-95 (5th Cir. 1986) (state law rate applied); *Trans Orient Navigators Co. v. M/S SOUTH WIND*, 788 F.2d 288, 293 (5th Cir. 1986) (same).

[22] 46 U.S.C. § 688.

[23] The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

[24] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947)(" . . . in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens.*"); *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 54 (1941).

[25] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33, 36 (1990) (holding that the general maritime law must yield to any conflict between that body of law and the United States Supreme Court's interpretation of FELA, as applied to the Jones Act).

[26] An excellent discussion of this rule is set forth by the Ninth Circuit in *Zipfel*, 832 F.2d at 1487. *See also, La Seguridad v. Transytur Line*, 707 F.2d at 1310, n.10; *Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752, 757 (C.D. Cal. 1983), *aff'd*, 771 F.2d 1277 (9th Cir. 1985).



## ARGUMENT

**An American Jones Act Seaman's choice of an American Forum should not be disturbed**

The most outstanding features of this litigation are the following:

(1) William Robert Miller, Sr. is an American resident and citizen;

(2) It is undisputed that the Jones Act applies to this controversy;

(3) The casualty occurred aboard M/V JOHN R, an American flagged vessel;

(4) M/V JOHN R was sailing American inland waters at the time of the casualty;

(5) The defendant, American Dredging Company, is an American corporation; and

(6) American Dredging Company was a litigant in Louisiana courts on sixteen occasions prior to this dispute, including several cases in which American Dredging Company was the plaintiff in the very same Lousisiana courts to which it now objects.

These facts indicate that Miller should be afforded his forum of choice for the resolution of his Jones Act claims, subject only to the amenability of American Dredging Company to *in personam* jurisdiction.

The majority view of the courts in this country is that, where the Jones Act applies, *forum non conveniens* is not available as a defense.[27] This rule applies *a fortiori*

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[27] *See, e.g., Zipfel v. Halliburton Co.*, 832 F.2d at 1487.

where the casualty occurs in the United States.[28] With respect to the position taken by ADC, a close analysis of their authority indicates that they have not a single holding to the contrary. For example, in *Cruz v. Maritime Co. of Phillippines, supra*, the court concluded that the Jones Act did **not** apply, so any statement of a contrary rule embraced by ADC is merely *obiter dicta*.[29] Similarly, the Fifth Circuit's inexplicable retreat from the majority rule is also *dicta* as respects Jones Act claims, as *In re Air Crash Disaster near New Orleans, La.* was merely a state law diversity case. Consequently, ADC is without citation to a single relevant decision to support its contentions.

Another rule of law which must be highlighted here is that there is "a strong presumption in favor of the plaintiff's choice of forum". *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 255 (1981). This rule is to be applied with even greater force in the case of a local plaintiff.[30] As Miller was a long time resident of the State of Louisiana, and as he is still certainly classified as a "local plaintiff" (given the fact that his current residence in Mississippi is within the subpeona power of the federal courthouse in New Orleans, Louisiana), the courts should not disturb Miller's choice of forum, which is convenient to him.[31]

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[28] *Id.* Zipfel was injured in Indonesia; Miller was injured on the Delaware River.

[29] *See* Edelman, *Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 530 (1984); *Zipfel v. Halliburton Co.*, 832 F.2d at 1486-87.

[30] *Id.* at 255-56.

[31] In this regard, it is quite noteworthy that Miller is currently considered to be totally disabled, and his spinal injury makes traveling long distances quite painful. Consequently, it would work a tremendous hardship upon Miller if the court were to require him to litigate in Philadelphia, as opposed to his home area of the Gulf Coast.



***Forum non conveniens* – Not fundamental, Not Constitutional, and preempted!**

ADC contends that the *forum non conveniens* doctrine is a "fundamental feature" of the general maritime law and that once this status is bestowed upon the doctrine, it is entitled to "constitutional" protection.[32] However, ADC fails to cite a single provision in the United States Constitution which cloaks the judicially created discretionary doctrine of *forum non conveniens* with constitutional protection. The only constitutional issues extant were already resolved adverse to ADC when the trial court expressly found that its exercise of *in personam* jurisdiction over ADC was constitutionally proper. Although ADC attempts to elevate *forum non conveniens* to constitutionally protected status, there is no authority to support such an ascension[33], as is painfully obvious from the complete absence of citation to a single section of the Constitution from which this purported status is claimed to emanate.[34]

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[32] Brief of petitioner, p. 7.

[33] As has been noted by Justice Scalia, the Court should not create Constitutional rights where none exist. *County of Riverside v. McGlaughlin*, 111 S.Ct. 1661, 1671 (1991) (Scalia, J., dissenting) (Noting that the Court's Constitutional jurisprudence "alternately creates rights that the Constitution does not contain and denies rights that it does").

[34] In fact, the commentators agree that the *forum non conveniens* doctrine is so internally inconsistent and varies so much in its application that it is not an appropriate doctrine to be applied via any *quasi*-preemption analysis. *See* Robertson and

With respect to ADC's assertions that *forum non conveniens* is a fundamental feature of the American admiralty law, it is quite noteworthy that not a single one of the United States Supreme Court decisions relied upon by ADC survives scrutiny in this regard. First, the modern cases upon which they rely, *Piper* and *Gilbert*, are both non-maritime cases – clearly these decisions cannot stand for the proposition that *forum non conveniens* is a "fundamental feature" of the general maritime law. Second, the trilogy of old maritime cases upon which ADC relies all involve disputes among foreigners, which brings comity[35] into play. For example, *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804), involved the salvage of a French ship by British interests on the high seas. *The Belgenland*, 114 U.S. 355 (1885), involved a high seas collision between Norwegian and Belgian vessels; and *Canada Malting Co. v. Paterson S.S. Ltd.*, 285 U.S. 413 (1932), involved both a foreign plaintiff and foreign defendant. Certainly, these cases are no authority for the propostion that an American seaman should not be able to bring his suit in an American court.[36]

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Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 970-73 (1990).

[35] Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12, 31-32 (1949).

[36] It is quite noteworthy that, even in *The Belgenland*, the Court refused to dismiss the case.



ADC charges forward in its quest for constitutional status for this doctrine under the flag of uniformity. However, "uniformity in the application of the general maritime law" is nothing other than a stated policy goal of *amicus* for the petitioner, the Maritime Law Association of the United States; it is certainly not constitutionally mandated, nor does it ring true in practice. As demonstrated previously in this brief, the admiralty is rife with instances where procedural and substantive matters vary according to state statutes or local customs and usages — this is to be expected in the shipping industry, a far flung enterprise. State laws are applied in the admiralty with respect to marine insurance, tariffs, *in rem* privileges, prejudgment interest and the right to a judge or jury trial. The doctrine of *forum non conveniens* is certainly no more important than the right to a jury trial, but the federal courts have already affirmed the States' rights to disregard the Seventh Amendment[37], including Louisiana's modification of judge/jury trial procedure in maritime matters tried in Louisiana's state courts.[38]

The precepts of federalism, when combined with the concurrent grant of maritime jurisdiction to the States by the "savings to suitors" clause, necessarily entails favoring the States with a certain amount of autonomy with respect to the adjudication of maritime claims. This is especially important with respect to procedural matters, such as discretionary determinations as to which cases the States will or will not hear in their courts. In fact, this

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[37] *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d at 1491; *Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211, 216 (1916).

[38] *Linton v. Great Lakes Dredge & Dock Co., supra.*

was the exact position taken by the United States Supreme Court over four decades ago in *Missouri v. Mayfield*, 340 U.S. at 3. There, the Court held that, in a personal injury claim brought in state court, even one involving a federal cause of action, it was up to the state to apply its own *forum non conveniens* rule, if any at all. *Id.* This indicates that the Court should not disturb this choice of the citizens of the State of Louisiana.

Louisiana's enactment of Article 123 C of the Louisiana Code of Civil Procedure indicates a conscious decision on the part of its citizenry to afford Jones Act litigants their day in Louisiana's courts — how can this be constitutionally prohibited? It is not.[39] This is an appropriate exercise of States' rights under the Tenth Amendment[40], and it is consistent with the States' freedom of choice[41] in the judicial administration of such matters.[42]

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[39] In making this decision, the "public interest factors", *Piper Aircraft Company v. Reyno*, 454 U.S. at 241 n.6, of the federal *forum non conveniens* inquiry are removed from the calculus, as the citizens of the State of Louisiana have already said "yes" to these suits.

[40] The promise of States' rights under the Tenth Amendment has been fulfilled by this Court via recognition of the doctrine of federalism. *New York v. United States*, 112 S.Ct. 2408, 2418 (1992).

[41] *Missouri v. Mayfield*, 340 U.S. at 3.

[42] In *Linton v. Great Lakes Dredge & Dock Co.*, the federal Fifth Circuit expressly noted that the Louisiana legislature was free to modify admiralty judge or jury trial procedures without running afoul of any Constitutional mandate. 964 F.2d at 1491. This clearly illustrates that the decision of Louisiana not to apply *forum non conveniens*, a common law doctrine which is foreign to its civilian courts, *Fox v. Board of Supervisors of Louisiana State Univ.*, 576 So. 2d 978, 990-91 (La. 1991), is an appropriate and constitutionally permissible choice.



**Preemption of forum non conveniens by FELA and the Jones Act**

The United States Supreme Court has repeatedly held that all of the rights and remedies inuring to the benefit of railway workers, as set forth in FELA and its interpretive jurisprudence, apply to Jones Act seamen by virtue of that act's[43] express terms.[44] Consequently, all of the jurisprudentially created rules which are corollary to FELA also apply to Jones Act claims. In fact, this was the basis for this Court's decision only three years ago in *Miles v. Apex Marine Corp., supra*. In *Miles* the Court noted that, as the Jones Act must remain faithful to prior judicial interpretations of FELA, the general maritime law must yield to any conflict between it and the FELA jurisprudence.[45] When this preemption analysis is focused upon the case *sub judice*, it is quite clear that the general maritime law's *forum non conveniens* jurisprudence must yield to the FELA rule which indicates that *forum non conveniens* may **not** be asserted as a defense:

> " . . . in cases under the Federal Employers' Liability Act we have held that plaintiff's choice

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[43] 46 U.S.C. § 688.

[44] *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958); *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110 (1959); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957).

[45] *See Miles v. Apex Marine Corp.*, 498 U.S. at 32-33, 36, citing the FELA case of *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), for the proposition that the general maritime law could not contravene the Court's prior pronouncements under FELA.

> of a forum cannot be defeated on the basis of *forum non conveniens*".

*Gulf Oil Corp. v. Gilbert*, 330 U.S. at 505. If this Court is to show any allegiance to *Miles*, it must hold that *forum non conveniens* may not be considered as a defense to a Jones Act claim.[46] The Court made its position very clear in *Miles*:

> The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 U.S.C. Section 59. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, . . . and it is the rule under the Jones Act.[47]

Consequently, there is no doubt that FELA precludes application of *forum non conveniens* to Miller's Jones Act suit.[48]

## CONCLUSION

The Jones Act is remedial legislation which is intended to protect and benefit injured seamen.[49] The

[46] *Zipfel v. Halliburton Co.*, 832 F.2d at 1487; *See also Panama R. Co. v. Johnson*, 264 U.S. 375 (1924)(noting broad venue policy inherent in the Jones Act).

[47] *Miles v. Apex Marine Corp.*, 498 U.S. at 36.

[48] The FELA rule is quite clear — *forum non conveniens* may not be applied. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 505.

[49] *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980) (Jones Act); *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958) (FELA).



State of Louisiana has merely furthered that goal by enacting Article 123 C of the Louisiana Code of Civil Procedure which provides that injured seamen are free to file their Jones Act claims in the courts of the State of Louisiana without having to contend with arduous pretrial claims of *forum non conveniens*.[50] The vast majority of federal courts which have considered the threshold question of whether or not *forum non conveniens* may be asserted as a defense to the Jones Act claims of American seamen have held that this defense is not available. Not a single reported decision has applied this doctrine to the detriment of an American seaman involved in a casualty in United States waters on an American flagged vessel.

The Federal Employers' Liability Act, the predecessor of the Jones Act, expressly prohibits the assertion of *forum non conveniens* as a defense.[51] If this Court is to remain true to its teachings in *Gilbert*, *Kepner*, and *Miles*, it must hold that *forum non conveniens* has no place in Jones Act litigation, especially with respect to claims brought by Americans like William Robert Miller, Sr. Louisiana has made that decision with respect to the operation of its courts, and the precepts of federalism[52] require that this

[50] The doctrine of *forum non conveniens* has been referred to not as a matter of convenience, but rather, a "connivance to avoid corporate accountability". *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991) (Doggett, J., concurring).

[51] *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 505.

[52] " . . . forcing state courts to follow federal forum non conveniens law is fundamentally inconsistent with general but deeply held tenets of federalism". Robertson and Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. at 975.

Court recognize that right of Louisiana as a co-equal sovereign.

## RELIEF SOUGHT

William Robert Miller, Sr. respectfully prays that this Honorable Court affirm the decision of the Supreme Court of Louisiana, and remand this matter for trial to the district court.

Respectfully submitted,

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FILED
AUG 16 1993
OFFICE OF THE CLERK

NO. 91-1950

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1992

AMERICAN DREDGING COMPANY
Petitioner,

vs.

WILLIAM ROBERT MILLER
Respondent.

On Writ of Certiorari To
The Supreme Court of the State of Louisiana

# REPLY BRIEF OF PETITIONER, AMERICAN DREDGING COMPANY

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## QUESTION PRESENTED

The question presented is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "savings to suitors" clause.

## LIST OF PARTIES

The parties to the action are William Robert Miller and American Dredging Company.

## TABLE OF CONTENTS

**PAGE**

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

Decisions ..... iii

Statutes ..... vii

Treatises and Other Authorities ..... viii

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTION, STATUTES ..... 2

STATEMENT OF CASE ..... 4

ARGUMENT ..... 5

There is No Reasonable Basis to Apply Different Maritime Rules for Claims of American and Foreign Plaintiffs or Defendants ..... 5

Neither Personal Jurisdiction Nor Proper Venue Replace the Doctrine of *Forum Non Conveniens* ..... 10



## TABLE OF CONTENTS (continued)

*Forum Non Conveniens* - an Important Characteristic of Admiralty ..... 11

The Admiralty Doctrine of *Forum Non Conveniens* Is Consistent With the Congressional Venue Policy. ..... 14

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**Decisions**

**PAGE**

*Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT*,
654 F.2d 147 (2d Cir. 1980) ..... 6

*Anderson v. Great Lakes Dredge and Dock Co.*,
411 Mich. 619, 309 N.W.2d 539 (Mich. S. Ct. 1981) ..... 8

*Argandona v. Lloyd's Register of Shipping*,
Case No. 92-7959 (Fla. 11th Cir. Ct., June 4, 1993) ..... 8

*Babineaux v. Lykes Bros. S.S. Co. Inc.*,
608 So.2d 659 (La. App. 3d Cir. 1992) ..... 13

*Baltimore & Ohio RR Co. v. Kepner*,
314 U.S. 44, 62 S. Ct. 6 (1941) ..... 14

*Dow Chemical Co. v. Castro Alfaro*,
786 S.W.2d 674 (Tex. 1990),
*cert. denied*, 498 U.S. 1024, 111 S. Ct. 671 (1991) ..... 12

## TABLE OF AUTHORITIES (continued)

*Fitzgerald v. Texaco, Inc.*,
521 F.2d 448 (2d Cir. 1975),
*cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976) ..... 12

*Forrest v. Waterman S.S. Corp.*,
617 So.2d 59 (La. App. 4th Cir. 1993) ..... 13

*Garrett v. Moore-McCormack Co.*,
317 U.S. 239, 63 S. Ct. 246 (1942) 13

*Gazis v. John S. Latsis, Inc.*,
729 F.Supp. 979 (S.D.N.Y. 1990) ..... 5

*Gulf Oil Corp. v. Gilbert*,
330 U.S. 501, 67 S. Ct. 839 (1947) ..... 6, 10, 11

*Hellenic Lines Limited, et al v. Rhoditis*,
398 U.S. 306, 90 S. Ct. 1731,
*reh'g denied*, 400 U.S. 856, 91 S. Ct. 23 (1970) ..... 5

*Ikospentakis vs. Thalassic S.S. Agency*,
915 F.2d 176 (5th Cir. 1990) ..... 12

*Kassapas v. Arkon Shipping Agency, Inc.*,
485 So.2d 565 (La. App. 5th Cir.),
*cert. denied*, 488 So. 2d 203 (La.),
*cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986) ..... 12

*Koster v. (American) Lumbermen's Mut. Casualty Co.*,
330 U.S. 518, 67 S. Ct. 828 (1947) ..... 6, 10

*Lauritzen v. Larsen*,
345 U.S. 571, 73 S. Ct. 921 (1953) ..... 5



## TABLE OF AUTHORITIES (continued)

*M/S BREMEN v. Zapata Off-Shore Company*,
407 U.S. 1, 92 S. Ct. 1908 (1972) ..... 9

*Markozannes v. Bermuda Star Line*,
No. 88-C-2440 (La. App. 4th Cir. March 20, 1989
and April 19, 1989),
*rev'd*, 545 So.2d 537 (La. 1989),
*cert. denied*, 493 U.S. 1043, 110 S. Ct. 837 (1990) ..... 8

*Markzannes v. Bermuda, Star Cruise Line, Inc.*,
545 So.2d 537 (La. 1989),
*cert. denied*, 493 U.S. 1043, 110 S.Ct. 837 (1990) ..... 7

*McAllister v. United States*,
348 U.S. 19, 75 S. Ct. 6 (1954) ..... 13

*Miles v. Apex Marine Corp.*,
498 U.S. 19, 111 S. Ct. 317 (1990) ..... 9, 13

*Miller v. American Dredging Co.*,
580 So. 2d 1091 (La. App. 4th Cir.),
*cert. granted*, 587 So.2d 648 (La. 1991),
*and rev'd*, 595 So.2d 615 (La. 1992),
*cert. granted*, 113 S. Ct. 1840 (1993) ..... 1

*Mitchell v. The Trawler Racer, Inc.*,
362 U.S. 539, 80 S. Ct. 926 (1960) ..... 13

*Neely v. Hollywood Marine, Inc.*,
530 So.2d 116 (La. 1988),
*cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989) ..... 13

## TABLE OF AUTHORITIES (continued)

*Pacific Car and Foundry Co. v. Pence*,
403 F.2d 949 (9th Cir. 1968) ..... 6

*Pastewka v. Texaco, Inc.*,
565 F.2d 851 (3d Cir. 1977) ..... 12

*Piper Aircraft Co. v. Reyno*
454 U.S. 235, 102 S. Ct. 252 (1981),
*reh'g denied*, 455 U.S. 928, 102 S. Ct. 1296 (1982) ..... 7, 10

*Prado v. Sloman Neptun Schiffahrts, A.D.*,
611 So.2d 691 (La. App. 4th Cir. 1992) ..... 9

*Quintero v. Klaveness Ship Lines*,
914 F.2d 717 (5th Cir.)
*reh'g denied, en banc*, 920 F.2d 931 (5th Cir. 1990),
*cert. denied*, 111 S. Ct. 1322 (U.S. 1991) ..... 12

*Rogers v. Missouri Pacific Railroad*,
352 U.S. 500, 77 S. Ct. 443 (1957) ..... 13

*Sherill v. Brinkerhoff Maritime Drilling*,
615 F.Supp. 1021 (N.D. Cal. 1985) ..... 5

*Sibaja v. Dow Chemical Co.*,
757 F.2d 1215 (11th Cir.),
*cert denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) ..... 12

*Symeonides v. Cosmar Compania Naviera, S.A.*,
433 So.2d 281 (La. App. 1st Cir.),
*cert. denied*, 440 So.2d 731 (La. 1983),
*cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). ..... 12



## TABLE OF AUTHORITIES (continued)

*The Lottawana*,
88 U.S. (21 Wall) 558 (1875) ..... 9

*Vargas v. A. H. Bull*,
44 N.J. Super 536, 131 A.2d 39 (N. J. S. Ct. 1957) ..... 8

*Vargas v. M/V MINI LAMA*,
709 F.Supp. 117 (E.D. La. 1989) ..... 5

*Washington v. W. C. Dawson & Co.*,
264 U.S. 219, 44 S. Ct. 302 (1924) ..... 9

*Zipfel v. Halliburton Co.*,
832 F.2d 1477 (9th Cir. 1987),
*cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819,
*reh'g denied*, 487 U.S. 1245, 109 S. Ct. 2 (1988) ..... 7, 12

**Statutes**

**PAGE**

28 U.S.C.A. § 1257 (West Supp. 1992) ..... 1

28 U.S.C.A. § 1333 (West 1949) ..... 2

28 U.S.C.A. § 1404 (West 1962) ..... 6, 12, 14

46 U.S.C.A. § 688 (West 1920 and Supp. 1992) ..... 3

La. Code Civ. Proc. Art. 123 (West Supp. 1992) ..... 2, 5, 8, 10

L.S.A. R.S. 22:655 (West Supp. 1992) ..... 6

U. S. Const., Art. III, Sec. 2, Cl. ..... 1, 2

**Treatises and Other Authorities**

**PAGE**

James Madison,
"Vices of the Political System
of the United States,"
*The Writings of James Madison*, (Vol. 2)
(G. Hunt ed. 1901), pp.361-369 ..... 9

Martin J. Norris,
*The Law of Maritime Personal Injuries*
§ 305 at 17 (3d ed. 1975)
(citing, *inter alia*, *The Osceola*, 189 U.S. 158, 23 S. Ct. 483.
(1903)) ..... 13

*In re: St. Croix Seamen's Asbestos Cases*,
Nos. 606/92 et al (*Territ.* Ct. V. I., June 18, 1993) ..... 9



## OPINIONS BELOW

All opinions below are contained in the Joint Appendix. The opinion of the trial court, the Civil District Court for Orleans Parish in Louisiana, is reproduced in the Joint Appendix, pp. 51, 52. Its judgment, dismissing the suit on the basis of petitioner's exception and maritime defense of *forum non conveniens*, appears in the Joint Appendix, pp. 49, 50. The opinion of the Louisiana Fourth Circuit Court of Appeal, affirming the trial court judgment, is reported at *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991) and is reproduced in the Joint Appendix, pp. 53-57. The Louisiana Supreme Court's opinion, reversing the appellate court and the trial court judgment, is reported at *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). It is reproduced in the Joint Appendix, pp. 58-67.

## JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court was entered on March 2, 1992. The petition for certiorari was filed on May 29, 1992, and this Court granted certiorari on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West Supp. 1992).

## CONSTITUTION, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a State and Citizens of another state; between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C.A. § 1333 (West 1949), commonly known as the "saving to suitors" clause, provides as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Louisiana Code of Civil Procedure Article 123 provides as follows:

> A. For the convenience of the parties and witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C.A. § 688 or federal maritime law.

## STATEMENT OF CASE

American Dredging Company (American Dredging), petitioner, adopts the Statement of Case presented in its brief on the merits.



## ARGUMENT

### I. There is No Reasonable Basis to Apply Different Maritime Rules for Claims of American and Foreign Plaintiffs or Defendants

William Robert Miller (Miller), respondent, contends that Article 123 of the Louisiana Code of Civil Procedure may prohibit application of the maritime doctrine of *forum non conveniens* to the Jones Act and maritime claims of American seamen against American corporate employers for injuries aboard American vessels in American waters although a different rule may be applicable for claims invoking foreign interests.[1] However, Jones Act and maritime remedies are available to both American and foreign seamen (*Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953) and *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, *reh'g denied*, 400 U.S. 856, 91 S. Ct. 23 (1970)); and Miller does not oppose the application of this doctrine to Jones Act and maritime claims of foreign seamen.[2] Miller's interpretation of Louisiana law would require application of different rules to maritime suits depending upon whether the claimant or employer was American or foreign. American Dredging respectfully replies that such fragmentation of maritime law is neither necessary nor consistent with the goals of uniformity.

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[1] *See* Miller's Brief, pp. 4, 5, 11 and 12. *See also* argument of Amicus, Solicitor General, that doctrine is "principally related to foreign parties . . . ," Brief at pp 16-17.

[2] *See, e.g. Gazis v. John S. Latsis, Inc.*, 729 F.Supp. 979 (S.D.N.Y. 1990); *Vargas v. M/V MINI LAMA*, 709 F.Supp. 117 (E.D.La. 1989); *Sherill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Cal. 1985), involving American and foreign seamen claims arising out of an aircrash in Indonesia.

Significantly, Miller's interpretation is not premised upon any local concern or interest of Louisiana in protecting Louisiana claimants, regulating Louisiana employers or remedying Louisiana accidents.[3] Instead, Miller urges application of Louisiana law for purported national concerns involving American claimants and American employers. Initially, it is inappropriate to use Louisiana procedure to prohibit litigation of non-local interests in a convenient forum when the national legislation of Congress and the national jurisprudence of this Court and of lower federal courts provide for the transfer or dismissal of suits by or against American interests when they are filed in inconvenient fora. 28 U.S.C.A. § 1404 (West 1962); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947); *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947); *Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir. 1980).

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[3] When there is such local interest, the doctrine permits the local forum to retain jurisdiction. However, as noted by the Ninth Circuit in *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954-955 (9th Cir. 1968), the "plaintiff's choice [of forum] is entitled to "minimal consideration" when "the forum has no particular interest in the parties or the subject matter" of the action.

In his brief on the merits, Miller attempts to cloak himself with local or Louisiana interests, alleging that while he moved from Mississippi to Pennsylvania only for employment, he maintained a separate family residence in Mississippi (p. 1), that American Dredging's underwriters appointed local counsel to defend the suit (p. 2), and that he is totally disabled, making long-distance travel "quite painful." (p. 12). Significantly, none of these contentions was urged in Miller's opposition filed with the trial court. *See*, generally Memorandum in Opposition to Defendant's Exceptions of Lack of Jurisdiction and, Alternatively, *Forum Non Conveniens*, J.A. pp. 31-42. In fact, American Dredging underwriters are not parties to the suit and could not even be sued directly under Louisiana's Direct Action Statute. L.S.A. R.S. 22:655.



Whatever justification is urged for disallowing a *forum non conveniens* dismissal when it would deny an American seamen the Jones Act remedy, Cf. *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819, *reh'g denied*, 487 U.S. 1245, 109 S. Ct. 2 (1988), is inapposite in cases where the Jones Act and other maritime remedies are not impaired and will be applied with equal vigor in a forum which is both interested in the dispute and convenient to the parties, witnesses and sources of proof.[4] Further, nothing in the Louisiana statute limits its application to American claimants, American employers, American vessels, or incidents in American waters. La. Code Civ. Proc. Art. 123C. Indeed, in *Markzannes v. Bermuda, Star Cruise Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837 (1990), the Louisiana Supreme Court compelled the trial court in Orleans Parish to adjudicate the claim of a Greek seaman against a Cayman Islands defendant for injuries or illnesses sustained

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[4] Miller's argument for an exception to application of *forum non conveniens* is actually accommodated within the doctrine itself. The forum analysis by the trial court takes into account the nationality and residence of the parties and the availability of the witnesses and sources of proof. Further, as the Court noted in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), *reh'g denied*, 455 U.S. 928, 102 S. Ct. 1296 (1982), the trial court must initially determine whether there is an alternative forum and the court may retain jurisdiction even in an inconvenient forum when the remedy available in the alternate forum is "so clearly inadequate or unsatisfactory that it is no remedy at all...." *Piper*, 102 S.Ct. at 265, 454 U.S. at 254. Therefore, dismissal under this doctrine would not be proper when the dismissal would deny the American claimant the Jones Act remedy against an American employer for injuries aboard an American ship in American waters. Such is not the case here.

aboard a Panamanian vessel, navigating on the high seas between Bermuda and Boston, Massachusetts. [5]

Louisiana's prohibition of the doctrine of *forum non conveniens* in maritime cases transcends state and national boundaries and directly impacts the cost, effort and efficiency of adjudication of maritime disputes arising in the ordinary course of national and international commerce. Other state courts have recognized the valuable role of this doctrine in directing maritime litigation to a convenient forum which is interested in the dispute. *Anderson v. Great Lakes Dredge and Dock Co.*, 411 Mich. 619, 309 N.W.2d 539 (Mich. S. Ct. 1981), Michigan court applying *forum non conveniens* to dismiss the Jones Act claim of a Florida resident for an injury in Florida; *Vargas v. A. H. Bull*, 44 N.J. Super 536, 131 A.2d 39 (N. J. S. Ct. 1957), New Jersey court applying *forum non conveniens* to dismiss the Jones Act claims of a Puerto Rican resident for injuries in Puerto Rico; *Argandona v. Lloyd's Register of Shipping*, Case No. 92-7959 (Fla. 11th Cir. Ct., June 4, 1993), dismissing foreign seamen

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[5] The underlying facts in *Markzannes* are recited in the decision of the intermediate appellate court in *Markozannes v. Bermuda Star Line*, No. 88-C-2440 (La. App. 4th Cir. March 20, 1989 and April 19, 1989), *rev'd*, 545 So.2d 537 (La. 1989), *cert. denied* 493 U.S. 1043, 110 S. Ct. 837 (1990), which is reproduced in the Joint Appendix at pp. 27-29, 23-26.

The Louisiana statute is also not limited to injury and death actions. The specific wording of subsection C makes the Louisiana *forum non conveniens* rule inapplicable to "claims brought pursuant to [the Jones Act] or federal maritime law." La. C. Civ. Proc. Art. 123C. Accordingly, the Louisiana rule compels its courts to hear all claims arising under federal maritime law (i.e. collision and cargo claims, salvage cases, charter disputes, etc.) without regard to the convenience of the parties, the availability of witnesses, the location of the sources of proof or the forum's lack of interest in the dispute at bar.



personal injury claims under doctrine of *forum non conveniens*; *see also, In re: St. Croix Seamen's Asbestos Cases*, Nos. 606/92 et al (*Territ.* Ct. V. I., June 18, 1993), applying *forum non conveniens* to dismiss multiple Jones Act claims of American (mainland) claimants for asbestos related injuries. Even a Louisiana intermediate court, while chary to violate the tenets of Article 123 or evade the rulings of the Louisiana Supreme Court, recognized the "potential usefulness of the doctrine of *forum non conveniens* [to the maritime injury claims of a foreign seaman] should the [Louisiana] legislature ever decide to revise [Art. 123]...." *Prado v. Sloman Neptun Schiffahrts, A.D.*, 611 So.2d 691, 703 (La. App. 4th Cir. 1992).

Miller's plea for a separate Louisiana rule for Americans harkens back to the vices of the provincial approach of legislation and jurisprudence during the Article of Confederation.[6] Such a rule is the anathema of the goals of uniformity of maritime law. Fragmentation of maritime law to favor some local or even national interest is exactly the type of parochial protectionism disavowed by the Constitutional endowment of admiralty jurisdiction. Such a fragmented approach runs directly counter to the uniform national approach which this Court has long recognized and guarded in its jurisprudence. *The Lottawana*, 88 U.S. (21 Wall) 558 (1875); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302 (1924); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990).

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[6] See, generally, the discussion of James Madison, "Vices of the Political of the United States," in *The Writings of James Madison*, (Vol. 2)(G. Hunt 1901), pp. 361-369. Indeed, a strict rule which would automatically favor Americans with an American forum was expressly rejected by this Court in *M/S BREMEN v. Zapata Off-Shore Company*, 407 U.S. 1, 8-10, 92 S. Ct. 1908, 1912-1913 (1972), wherein the Court upheld the validity of a forum selection clause which compelled American interests to litigate in a foreign forum.

The doctrine of *forum non conveniens* fairly protects the rights of all maritime litigants. There is simply no efficacy in requiring that different rules be applied to identical Jones Act or maritime claims based upon the nationality of the parties.

## II. Neither Personal Jurisdiction Nor Proper Venue Replace the Doctrine of *Forum Non Conveniens*

Both Miller and the Amicus, Solicitor General, urge that the establishment of personal jurisdiction over a maritime defendant coupled with proper venue of the trial court satisfies any deficiency regarding the inconvenience of the forum.[7] These arguments rely upon the "due process" requirement of minimum contacts and upon statutory venue rules to replace this maritime doctrine. However, *forum non conveniens* is never applicable unless personal jurisdiction and proper venue are established. As this Court recognized in *Gulf Oil*, "the doctrine ... can never apply if there absence of jurisdiction or mistake of venue." *Gulf Oil*, 330 U.S. at 504, 67 S.Ct. at 841.

The broad reach of personal jurisdiction under long-arm statutes within the scope of federal and state venue provisions may admit vexatious or oppressive forum selection in some instances unless the exercise of jurisdiction is tempered with the

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[7] *See:* Miller's Brief at pp 13-16, Brief of Amicus, Solicitor General, at pp. 22-23, 24-27. The rule urged by Miller and the Solicitor General would create a curious result in which maritime actors whose interests are Constitutionally protected could be subjected to vexatious and oppressive forum shopping while non-marine interests - both domestic and foreign - would be entitled to the full protection of the doctrine of *forum non conveniens* under both state and federal law. La. Code C. Proc. Art. 123; 28 U.S.C. § 1404 (West 1962); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981); *reh'g denied*, 455 U.S. 928, 102 S.Ct. 1296 (1982); *Gulf Oil, supra; Koster, supra.*



doctrine of *forum non conveniens*. Were the exercise of jurisdiction totally unrestricted in maritime actions, claimants could indiscriminantly select inconvenient fora which selection could unfairly influence the course and outcome of the litigation. *Gulf Oil*, 330 U. S. at 507, 67 S. Ct. at 842. The flexible standard of *forum non conveniens* achieves fundamental fairness by balancing the broad exercise of jurisdiction with the legitimate interests of all maritime parties. It accommodates the maritime plaintiff's choice of forum with the reasonable convenience of the parties, the availability of the witnesses, the access to the sources of proof and the interest of the forum in the dispute at hand.

## III. *Forum Non Conveniens* - an Important Characteristic of Admiralty

Miller and the Solicitor General downplay the importance of the doctrine by suggesting that it is not unique to admiralty[8], that it is mere procedure which does not affect the substantial rights of the parties[9], and that uniformity in this instance is unimportant or unattainable because the doctrine is discretionary[10].

It is true that this doctrine is no longer "unique" to admiralty. This fact merely reflects its vitality and utility through its incorporation into other areas of law. As was ably stated in the brief of Amicus, Maritime Law Association (MLA), this recognition in no way undermines its importance as a characteristic feature of admiralty.[11] As noted therein, the law of admiralty has often been the precursor in the development of

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[8] Brief of Amicus, Solicitor General at pp. 14-15.
[9] *Id* at 15, 18-23; Miller's Brief at 15-16.
[10] Brief of Amicus, Solicitor General at 15-16.
[11] See, Amicus (MLA) Brief, p. 13.

principles and standards later imported or adopted by other legal regimes. This historical role of admiralty further underscores the importance of protecting and preserving its uniform application in both federal and state courts.

The argument that the doctrine is mere procedure which does not affect substantial rights overlooks the fundamental protection and fairness which the doctrine accords all maritime litigants. In a practical sense, the rule serves the valuable role of focusing litigation toward efficient and economical resolution and protecting maritime interests from vexatious forum selection and multiple adjudications of the forum issue.[12] Under the double (federal and state) standard proposed by Miller, a maritime claimant could initially select an inconvenient federal forum with practical impunity. Even if the federal court dismissed the action because of *forum non conveniens* or transferred the action under 28 U.S.C.A. § 1404, the claimant could simply refile the identical action in state court without regard to the prior federal ruling and irrespective of the convenience of the parties, the witnesses' availability, the sources of proof or the interest of the local forum. The maritime defendant would be totally

[12] *See, e.g., Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Ikospentakis, supra* at 177; *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir.), *cert. denied*, 488 So. 2d 203 (La. 1986) *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La. App. 1st Cir. 1983), *cert. denied*, 440 So.2d 731 (La. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976); *see also: Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985), and *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 671 (1991).



powerless to require even consideration of the appropriateness of the selected state forum. However, if this Court upholds a uniform maritime standard, the legitimate interests of plaintiffs and defendants will be protected and a review of the appropriateness of the forum can be assured.

The Solicitor General argues that uniformity of maritime law is unimportant and unattainable in this instance because dismissal under the doctrine is discretionary. This contention overlooks that the goal of uniformity is that the legal standard be uniform and applied to all maritime cases, not that the result be identical. For example, maritime law compels the application of uniform rules governing such issues as Jones Act negligence[13], unseaworthiness[14], proximate cause[15], burden of proof[16], appellate review[17], etc. These standards are uniform and applicable to all maritime cases in state[18] and federal courts even though the trial judge or jury may reach different conclusions after consideration of the relevant factors in light of each applicable uniform standard. All that is sought here is the application of a uniform standard - the doctrine of *forum non conveniens* - to all admiralty cases.

[13] *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 324 (1990).
[14] *Mitchell v. The Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926 (1960).
[15] *Martin J. Norris, The Law of Maritime Personal Injuries* § 305 at 17 (3d ed. 1975) (citing, *inter alia*, *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903)).
[16] *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942).
[17] *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6 (1954).
[18] *See, e.g. Neely v. Hollywood Marine, Inc.*, 530 So.2d 116 (La. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989); *Babineaux v. Lykes Bros. S.S. Co. Inc.*, 608 So.2d 659, 662 (La. App. 3d Cir. 1992); *Forrest v. Waterman S.S. Corp.*, 617 So.2d 59, 61 (La. App. 4th Cir. 1993).

## IV. The Admiralty Doctrine of *Forum Non Conveniens* Is Consistent With the Congressional Venue Policy.

The Solicitor General suggests that *forum non conveniens* should be disregarded because of Congressional policy regarding venue selection.[19] American Dredging replies that *forum non conveniens* is totally consistent with Congressional policy favoring adjudication of disputes in fora which are convenient to the parties and witnesses. 28 U.S.C.A. § 1404. This federal transfer statute directly parallels the maritime doctrine of *forum non conveniens* and was enacted in response to the Court's ruling in *Baltimore & Ohio RR Co. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6 (1941), which disallowed a *forum non conveniens* dismissal of a FELA action because of the specific venue provision in the FELA statute. *Kepner*, 314 U.S. at 53. Congress thereafter expressly authorized a transfer of all federal actions, including FELA and Jones Act claims, based upon the convenience of the parties and witnesses. *See, Revision Notes* to 28 U.S.C.A. § 1404(a). Application of the doctrine of *forum non conveniens* in Jones Act cases therefore promotes the comparable goal expressly recognized by Congress in 28 U.S.C.A. § 1404(a).

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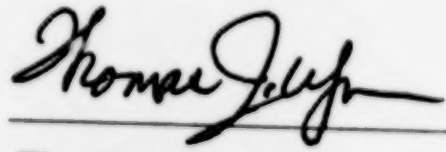
[19] See Brief of Solicitor General, pp. 24-26.



## CONCLUSION

The doctrine of *forum non conveniens* is a simple rule of fairness. It promotes the legitimate interests of maritime litigants in achieving prompt, efficient and economical resolution of maritime disputes without disadvantage or favoritism to either litigant. It admirably recommends itself as a fundamental feature of maritime law.

Respectfully submitted,



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FILED
JUL 19 1993
OFFICE OF THE CLERK

No. 91-1950 (9)

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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AMERICAN DREDGING COMPANY, PETITIONER

*v.*

WILLIAM ROBERT MILLER

---

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

---

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## QUESTION PRESENTED

Whether admiralty cases filed in state court under the Jones Act, 46 U.S.C. App. 688, and the "saving to suitors" clause, 28 U.S.C. 1333(1), are governed by the state rather than the federal law of *forum non conveniens.*


**EDITOR'S NOTE**

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TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 1 |
| Summary of argument | 5 |
| Argument: | |
| The State's approach to *forum non conveniens* in maritime cases does not interfere with the necessary uniformity of federal maritime law or work material prejudice to characteristic features of that body of federal law | 7 |
| A. The "saving to suitors" clause permits state courts to adjudicate *in personam* maritime actions, provided that the available remedies are consistent with substantive federal maritime law | 7 |
| 1. Article III grants federal courts authority to develop and apply principles of admiralty law | 7 |
| 2. Congress has preserved a substantial role for the States in adjudicating maritime disputes | 8 |
| B. The doctrine of *forum non conveniens* is not a characteristic feature of admiralty law requiring uniformity | 13 |
| 1. The traditional applicability of the doctrine of *forum non conveniens* in admiralty does not require preemption | 14 |
| 2. Louisiana's open-forum rule permissibly supplies a forum for maritime claims without materially intruding upon the uniformity of maritime law | 18 |
| 3. Federal statutory policies confirm the validity of Louisiana's application of its own forum convenience rules to Jones Act and general maritime tort cases | 24 |
| Conclusion | 29 |
| Appendix | 1a |

## TABLE OF AUTHORITIES


Cases: Page

*Air Crash Disaster Near New Orleans, In re*, 821 F.2d 1147 (5th Cir. 1987), vacated *sub nom. Pan American World Airways, Inc.* v. *Lopez*, 490 U.S. 1032 (1989) ..... 11

*Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U.S. 532 (1928) ..... 19

*American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828) ..... 8

*Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987) ..... 23, 24

*Bainbridge* v. *Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932) ..... 6, 21, 25

*Camejo* v. *Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988) ..... 18

*Canada Malting Co.* v. *Paterson S.S., Ltd.*, 285 U.S. 413 (1932) ..... 14

*Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930) ..... 16

*Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918) ..... 21

*Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988) ..... 13

*Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960) ..... 22

*Crowell* v. *Benson*, 285 U.S. 22 (1932) ..... 8

*Davis* v. *Department of Labor & Industries*, 317 U.S. 249 (1942) ..... 12, 13

*Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297 (1983) ..... 19

*Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) ..... 4

*Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd, 486 U.S. 140 (1988) ..... 3, 18, 24

*Fox* v. *Board of Supervisors*, 576 So. 2d 978 (La. 1991) ..... 27

*Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942) ..... 4, 19, 20, 27, 28

*Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922) ..... 19

*Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479 (1923) ..... 19





Cases—Continued: Page

*Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) ..... 11

*Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) ..... 14, 15, 17

*Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984) ..... 2, 24

*Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 (1970) ..... 21

*Hess* v. *United States*, 361 U.S. 314 (1960) ..... 22

*Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990) ..... 18

*International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) ..... 23

*John Baizley Iron Works* v. *Span*, 281 U.S. 222 (1930) ..... 12

*Just* v. *Chambers*, 312 U.S. 383 (1941) ..... 11, 19

*Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920) ..... 7, 8

*Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) ..... 12, 13, 19, 20, 24

*Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947) ..... 14, 15, 16

*Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) ..... 21

*Madruga* v. *Superior Court*, 346 U.S. 556 (1954) ..... 5, 9, 10, 17

*Mason* v. *Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804) ..... 17

*McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) ..... 2, 6, 26, 27

*Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990) ..... 2, 24

*Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950) ..... 4, 6, 21, 27, 28

*Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) ..... 19, 25, 26

*Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955) ..... 22

*Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) ..... 4, 9, 10

*Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U.S. 490 (1923) ..... 20

*Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280 (1897) ..... 14, 15, 17

*Panama R.R.* v. *Vasquez*, 271 U.S. 557 (1926) ..... 2, 25

*Parsons* v. *Chesapeake & O. Ry.*, 375 U.S. 71 (1963) ..... 22

Cases—Continued: Page

*Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981) .. 14, 15, 16, 22
*Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966) ..... 25
*Quintero* v. *Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990), cert. denied, 111 S. Ct. 1323 (1991) ..... 18
*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109 (1924) ..... 5, 9, 10, 19
*Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449 (1925) ..... 19
*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959) ..... 8, 9, 11, 12, 13, 21, 26
*Sibaja* v. *Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985) ..... 11
*Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917) ..... 5, 11, 12, 13
*Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22 (1988) ..... 11, 21
*Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950) ..... 17
*Testa* v. *Katt*, 330 U.S. 386 (1947) ..... 27-28
*The Belgenland*, 114 U.S. 355 (1885) ..... 14, 15, 16, 17
*The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ..... 24
*The Harrisburg*, 119 U.S. 199 (1886) ..... 19
*The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875) .. 8, 9, 12
*The Maggie Hammond*, 76 U.S. (9 Wall.) 435 (1870) ..... 14, 15, 16-17
*The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867 .. 7, 10
*The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959) .... 19
*Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919) .. 20
*Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924) ..... 18, 21
*Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921) .... 19
*Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) ..... 20
*Willendson* v. *Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682) ..... 14
*World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980) ..... 23



Constitution and statutes: Page

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) ..... 12
Art. III, § 2, Cl. 1 (Admiralty Clause) ..... 5, 7
Amend. XIV (Due Process Clause) ..... 24
Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* ..... 4, 6
Jones Act of 1920, 46 U.S.C. App. 688 ..... 1, 25, 1a
46 U.S.C. App. 688(a) ..... 2, 4, 26, 28
Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 ..... 9, 10
28 U.S.C. 1332 ..... 4
28 U.S.C. 1333 ..... 1a
28 U.S.C. 1333(1) ..... 5, 9, 1a
28 U.S.C. 1404(a) ..... 11, 21, 22
La. Code Civ. Proc. Ann. (West Supp. 1993):
Art. 123 ..... 27, 1a
Art. 123(B) ..... 3, 27, 2a
Art. 123(C) ..... 3, 4, 27, 2a

Miscellaneous:

Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963) ..... 12
1 E. Benedict, *The American Admiralty* (G. McCloskey 5th ed. 1925) ..... 7
Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949) ..... 17
G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) ..... 8, 10
J. Story, *Commentaries on the Constitution* (abridged ed. 1833) (1987 reprint) ..... 7
*The Federalist* No. 80 (A. Hamilton) (J. Cooke ed. 1961) ..... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 91-1950

AMERICAN DREDGING COMPANY, PETITIONER

*v.*

WILLIAM ROBERT MILLER

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

## INTEREST OF THE UNITED STATES

The question presented in this case is whether, consistent with doctrines of admiralty preemption, the States may adopt and enforce their own rules of *forum non conveniens* in cases arising under general maritime tort law and the Jones Act, 46 U.S.C. App. 688. The United States has a substantial interest in assuring that the federal interest in the uniformity of maritime law is vindicated, while at the same time avoiding unnecessary encroachment upon the ability of States to legislate on matters of legitimate state concern. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

## STATEMENT

1. Respondent, a Mississippi resident, moved to Pennsylvania to seek employment in 1987. Petitioner, a Pennsylvania corporation with its principal place of business in New Jersey, hired respondent to work on the M/V John R., a tug operating on the Delaware River.

Respondent was injured in the course of that employment on the Delaware River. He was subsequently treated for his injuries in Pennsylvania, New York, and Mississippi. Pet. App. A10.

2. On December 1, 1989, respondent filed this action in the Civil District Court for the Parish of Orleans, Louisiana. J.A. 7-9. Respondent requested relief under the Jones Act, 46 U.S.C. App. 688(a), which authorizes a seaman who suffers personal injury "in the course of his employment" to bring "an action for damages at law."[1] Respondent also sought to recover under general maritime law for unseaworthiness of the tug and for wages and maintenance and cure. See J.A. 7-9.[2]

Petitioner moved to dismiss the action for lack of personal jurisdiction and under the doctrine of *forum non conveniens*. The state trial court rejected petitioner's challenge to personal jurisdiction, noting that petitioner had appointed an agent for service of process in Louisiana. That ruling is not at issue here.[3] Petitioner's motion to dismiss the complaint under the doctrine of *forum non conveniens*, however, was granted. Pet. App. A4.

[1] By providing "an action in negligence for the death or injury of a seaman," the Jones Act overturned the effect of prior maritime case law holding that "seamen could recover under general maritime law for injuries resulting from unseaworthiness, but not negligence." *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 29 (1990). The state courts "have jurisdiction, concurrently with the federal courts, to enforce the right of action established by the * * * [Jones] Act." *Panama R.R.* v. *Vasquez*, 271 U.S. 557, 562 (1926).

[2] As this Court has explained, "[w]hen a seaman is injured he has three means of recovery against his employer: (1) maintenance and cure, (2) negligence under the Jones Act, and (3) unseaworthiness." *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958).

[3] Petitioner argued (J.A. 16-17) that respondent's claim was unrelated to petitioner's contacts with the forum and that petitioner lacked the continuous and systematic contacts necessary to justify the assertion of personal jurisdiction on a general jurisdiction theory. See *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-419 (1984). The trial court rejected petitioner's argument on the ground that petitioner's appointment of an agent for service of process constituted consent to be sued. Pet. App. A3. Petitioner did not challenge that ruling on appeal.



Dismissal was predicated on the trial court's finding, not challenged here, that Louisiana "ha[d] absolutely no connection with the case" and was an inconvenient forum. Pet. App. A4. The court acknowledged that those facts were irrelevant under state law because La. Code Civ. Proc. Ann. art. 123(C) (West Supp. 1993) expressly bars dismissal of respondent's claim on grounds of inconvenience.[4] Pet. App. A4. The court nevertheless held that state law was preempted in maritime actions filed in state court, relying on the Fifth Circuit's analysis of that issue in *Exxon Corp.* v. *Chick Kam Choo*, 817 F.2d 307 (1987), rev'd on other grounds, 486 U.S. 140 (1988). Applying the federal maritime rule of *forum non conveniens*, the court dismissed the action. Pet. App. A4. The Louisiana Court of Appeal for the Fourth District affirmed. *Id.* at A5-A9.

3. The Supreme Court of Louisiana reversed. Pet. App. A10-A19. The court first determined that under Article 123(C) of the Louisiana Code of Civil Procedure, "the doctrine of forum non conveniens is specifically made unavailable in * * * Jones Act or maritime law case[s]" brought in Louisiana state courts. Pet. App. A14. The court further determined that the state law that renders the doctrine unavailable is not preempted. The court reasoned that, under settled federal law, States are free to provide a remedy for maritime torts as long as the remedy does not effect a change in "substantive maritime law" or contravene a "fundamental feature of admiralty law." *Id.* at A15. In the court's view, the rule

[4] Under La. Code Civ. Proc. Ann. art. 123(B) (West Supp. 1993), a state court may dismiss a suit "in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state." Article 123(C), however, provides that "[t]he provisions of Paragraph B shall not apply to claims brought pursuant to 46 [U.S.C. App.] § 688 or federal maritime law."

of *forum non conveniens* applied by federal courts is not a substantive or fundamental feature of the general maritime law.

In so holding, the court relied primarily on the decision in *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950). *Mayfield* determined (*id.* at 3) that state courts are not required to apply the federal doctrine of *forum non conveniens* in cases arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, even though liability under the FELA is governed by federal substantive law. The Supreme Court of Louisiana concluded (Pet. App. A15-A16) that the *Mayfield* analysis should also govern Jones Act claims in state courts because the Jones Act expressly incorporates the remedial provisions of the FELA.[5]

Further, the Supreme Court of Louisiana found it significant that in diversity cases (28 U.S.C. 1332), the Fifth and Eleventh Circuits have treated the doctrine of *forum non conveniens* as "procedural" for purposes of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). See Pet. App. A16-A17; see also note 11, *infra*. Noting that this Court has applied a "reverse-*Erie*" doctrine in addressing maritime preemption issues (*Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223 (1986)), the state supreme court held that "the doctrine of forum non conveniens is not a substantive feature of the general maritime law" and that the state rule is not preempted. Pet. App. A19.[6]

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[5] Congress has provided that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in Jones Act suits. 46 U.S.C. App. 688(a). Accordingly, the Jones Act is "based upon, and incorporates by reference," the FELA. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942).

[6] In that regard, the state supreme court emphasized that the application of Article 123(C) will "not be outcome determinative" because the substantive law applied in this case—the Jones Act and general federal maritime law—will be the same whether the case is litigated in Louisiana or Pennsylvania. Pet. App. A17-A18.



## SUMMARY OF ARGUMENT

1. The Supreme Court of Louisiana correctly held that the doctrine of *forum non conveniens* is not a characteristic feature of admiralty law that must be governed by a uniform federal rule. Although the Constitution extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction" (U.S. Const. Art. III, § 2, Cl. 1), Congress has consistently given the States substantial power to adjudicate maritime cases. Under the "saving to suitors" clause of 28 U.S.C. 1333(1), a state court may exercise *in personam* jurisdiction over a maritime action and may "'adopt such remedies, and * * * attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga* v. *Superior Court*, 346 U.S. 556, 561 (1954) (quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924)). Accordingly, States may apply their statutes to maritime cases unless their laws "contravene[] the essential purpose expressed by an act of Congress or work[] material prejudice to the characteristic features of the general maritime law or interfere[] with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216 (1917).

2. a. Although the doctrine of *forum non conveniens* has traditionally been a feature of maritime law, that fact does not require that it be given preemptive effect in state court. First, the doctrine is not a unique feature of admiralty, but is one of general application in civil cases. Second, application of the doctrine has traditionally been committed to the trial court's discretion, showing that uniformity of application is not a central policy of the doctrine itself. And third, the doctrine's traditional application in admiralty cases has been in cases involving foreign parties.

b. The effect of the State's policy decision to make the defense of *forum non conveniens* unavailable in maritime and Jones Act cases properly brought in its courts is

merely to provide another forum for redress of a tort that is itself defined by substantive maritime law. Under the federal maritime preemption principles articulated by this Court, that is a choice available to a State. Where a State is merely providing a more effective remedy—without materially affecting the substantive legal standards imposed upon vessel operators—this Court has been reluctant to find preemption.

c. The State's authority to apply its own forum convenience policy, moreover, is supported by Congress's determination that the States' venue determinations should prevail in related statutory contexts. This Court has indicated that state, not federal, venue policies govern the choice of a state court forum under the Jones Act (see *Bainbridge* v. *Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932)), and that congressional policy should apply with equal force to a seaman's related maritime claim for personal injury. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958). In addition, in *Missouri ex rel. Southern Ry.* v. *Mayfield, supra,* this Court held that States are free to adopt or reject a *forum non conveniens* defense in cases brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*—a federal tort statute that applies to railroad employers in interstate commerce, requires uniformity, and is incorporated by reference into the Jones Act. These enactments indicate that the application of state law governing the selection of a state-court forum does not impermissibly interfere with needed uniformity in tort actions arising in interstate commerce.



## ARGUMENT

### THE STATE'S APPROACH TO *FORUM NON CONVENIENS* IN MARITIME CASES DOES NOT INTERFERE WITH THE NECESSARY UNIFORMITY OF FEDERAL MARITIME LAW OR WORK MATERIAL PREJUDICE TO CHARACTERISTIC FEATURES OF THAT BODY OF FEDERAL LAW

#### A. The "Saving To Suitors" Clause Permits State Courts To Adjudicate *In Personam* Maritime Actions, Provided That The Available Remedies Are Consistent With Substantive Federal Maritime Law

##### 1. *Article III grants federal courts authority to develop and apply principles of admiralty law*

Article III extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2, Cl. 1. That jurisdictional grant has traditionally been understood to serve two substantial federal interests; as Justice Story explained, "the admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations, and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic." J. Story, *Commentaries on the Constitution* § 870, at 618-619 (abridged ed. 1833) (1987 reprint); see, *e.g.*, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430-431 (1867); 1 E. Benedict, *The American Admiralty* § 9, at 10-11 (G. McCloskey 5th ed. 1925); see also *The Federalist* No. 80, at 538 (A. Hamilton) (J. Cooke ed. 1961). Thus, the "fundamental purpose" underlying the grant of federal admiralty jurisdiction is "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920).

Consistent with that purpose, this Court has construed the Admiralty Clause of Article III and implementing statutory provisions not only to confer admiralty and

maritime jurisdiction on the federal courts, but also to confer upon those courts the power to develop and apply a federal common law of admiralty. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959); G. Gilmore & C. Black, *The Law of Admiralty* § 1-9, at 20 (2d ed. 1975). Because the Constitution does not define "the precise limits" of the system of maritime law (*The Lottawanna*, 88 U.S. (21 Wall.) 558, 574 (1875)), the federal courts are called upon "to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' and to continue the development of this law within constitutional limits." *Romero*, 358 U.S. at 361 (quoting *Crowell* v. *Benson*, 285 U.S. 22, 55 (1932)); see, *e.g.*, *Knickerbocker Ice*, 253 U.S. at 160 ("The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law."); *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) ("the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise"). The federal courts must do so, moreover, with an eye toward preserving "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. (21 Wall.) at 575.

### 2. *Congress has preserved a substantial role for the States in adjudicating maritime disputes*

Despite the strong federal interest in uniform rules of admiralty, Congress has consistently preserved a substantial role for the States in the adjudication of admiralty and maritime disputes.[7] In implementing its authority over

[7] Congress's preservation of significant state authority is consistent with the general understanding of maritime law in the international sphere. As this Court has explained:

> Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be.

*The Lottawanna*, 88 U.S. (21 Wall.) at 572.



admiralty cases in Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 77, the First Congress provided for the exclusive jurisdiction of the district courts in admiralty and maritime cases, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Currently, Section 9's successor gives district courts "original jurisdiction, exclusive of the courts of the States, of * * * [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. 1333(1).[8] Although the pertinent jurisdictional statute has always vested "exclusive" jurisdiction in federal courts, it is well settled that the so-called "savings to suitors" clause has left the States with significant authority to adjudicate admiralty and maritime claims.

This Court has interpreted the "saving to suitors" clause to mean that "[a]dmiralty's jurisdiction is 'exclusive' only as to those maritime causes of action begun and carried on as proceedings *in rem*, that is, where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga*, 346 U.S. at 560.[9] Section 1333(1) accord-

[8] Although the clause was amended to its present form in 1948 and 1949, "this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act." *Madruga*, 346 U.S. at 560 n.12; see *Offshore Logistics*, 477 U.S. at 222-223.

[9] The "saving to suitors" clause was originally phrased to cover only "common law" remedies, and "[a] proceeding *in rem*, as used

ingly "leave[s] state courts 'competent' to adjudicate maritime causes of action in proceedings *'in personam,'* that is, where the defendant is a person, not a ship or some other instrument of navigation." 346 U.S. at 560-561.

It is also well established that when a state court has "concurrent jurisdiction" over a maritime claim under the "saving to suitors" clause, the State may " 'adopt such remedies, and * * * attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' " *Madruga*, 346 U.S. at 561 (quoting *Red Cross Line*, 264 U.S. at 124); accord, *Romero*, 358 U.S. at 372 n.32.[10] "Stated another way, the 'saving to suitors' clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics*, 477 U.S. at 222-223.

The so-called "reverse-*Erie*" doctrine is based upon general principles of admiralty preemption.[11] As this Court has noted:

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in the admiralty courts, is not a remedy afforded by the common law." *The Moses Taylor*, 71 U.S. (4 Wall.) at 431.

[10] Although the "saving to suitors" clause originally saved "the right of a common law remedy" (1 Stat. 77), the term "common law" was understood "to include all legal, equitable and statutory rights and remedies, other than the distinctive admiralty *in rem* proceeding." G. Gilmore & C. Black, *supra*, § 1-13, at 39; see *Red Cross Line*, 264 U.S. at 123-124 (citing cases).

[11] We agree with petitioner (Br. 24-26) and amicus Maritime Law Association of the United States (MLA) (Br. 14-15) that the "reverse-*Erie*" rubric should not be understood to mean that choice-of-law inquiries in the admiralty context necessarily turn on the same dichotomy of substance and procedure that exists in diversity cases. As this Court has explained, "[t]he nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). In contrast, the choice-of-law issue in admiralty focuses on whether state law works material prejudice to characteristic features of maritime law requiring uniformity. See *Jensen*, 244 U.S. at 216. As we explain below (see pp. 13-23, *infra*), the decision of the Supreme Court of Louisiana is correct under the *Jensen* standard.

Even under *Erie*, however, federal *forum non conveniens* rules have been applied in diversity cases. See, *e.g.*, *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), vacated on other grounds *sub nom. Pan American World Airways, Inc.* v. *Lopez*, 490 U.S. 1032 (1989); *Sibaja* v. *Dow Chemical Co.*, 757 F.2d 1215, 1218-1219 (11th Cir.) (per curiam), cert. denied, 474 U.S. 948 (1985). As those decisions explain, the doctrine merely effectuates a court's interest in "control[ling] the administration of the litigation before it and [in] prevent[ing] its process from becoming an instrument of abuse, injustice and oppression." *Sibaja*, 757 F.2d at 1218. It is "a rule of venue, not a rule of decision." *Id.* at 1219. Thus, the contours of the doctrine are a matter for the sovereign whose courts are being used, not the sovereign whose substantive law is being applied. *Cf. Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 32 (1988) (state forum-selection policy does not prevent application of the federal transfer-of-venue statute, 28 U.S.C. 1404(a), in diversity cases).



> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

*Romero*, 358 U.S. at 373 (footnote omitted). Thus, state law may "modify or supplement" (*Just* v. *Chambers*, 312 U.S. 383, 388 (1941)) general maritime law, unless it "contravenes the essential purpose expressed by an act of Congress or works material prejudice to the

characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216.

This Court has emphasized that "it would be difficult, if not impossible, to define with exactness" when state-law rules may be applied in maritime cases. *Jensen*, 244 U.S. at 216; see, *e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738 (1961); *Davis* v. *Department of Labor & Industries*, 317 U.S. 249, 253 (1942); Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 34 (1963); see also *The Lottawanna*, 88 U.S. (21 Wall.) at 574. But it has approved the choice of state-law rules in a variety of contexts—allowing, for example, the maritime application of "[s]tate-created liens[,] * * * [s]tate remedies for wrongful death and state statutes providing for the survival of actions, * * * [s]tate rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, [and] state laws regulating the the effect of a breach of warranty under contracts of maritime insurance." *Romero*, 358 U.S. at 373 (footnotes omitted).

The import of those decisions is that each state rule touching upon maritime and admiralty concerns must be considered carefully under the particular circumstances. See *Davis*, 317 U.S. at 253 ("the margins of state authority must 'be determined in view of surrounding circumstances as cases arise'") (quoting *John Baizley Iron Works* v. *Span*, 281 U.S. 222, 230 (1930)). Under the *Jensen* framework, "basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law?" *Davis*, 317 U.S. at 254 (quoting *Jensen*, 244 U.S. at 216).[12] And the process of

[12] *Jensen* analogized the doctrine of admiralty preemption to the limitations on state power under the dormant Commerce Clause:

> "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, * * * Congress can alone act upon it and provide the needed regulations. * * *." And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

*Jensen*, 244 U.S. at 216-217 (citations omitted); see, *e.g.*, *Davis*, 317 U.S. at 257.



decision, in practice, is "one of accommodation" between the need for uniformity and the State's interest in regulating the matter at hand. *Kossick*, 365 U.S. at 739. Thus, even where a state rule of decision may "conflict[] with a rule of maritime law," the Court has been willing to uphold the state rule if the maritime rule "did not require uniformity." *Romero*, 358 U.S. at 373-374.

### B. The Doctrine of *Forum Non Conveniens* Is Not a Characteristic Feature of Admiralty Law Requiring Uniformity

For several reasons, the Supreme Court of Louisiana's holding in this case—that the State may apply its own open-forum policy, rather than a federal doctrine of *forum non conveniens*, to maritime claims between domestic parties—is correct.[13] First, at least where domestic parties are concerned, the application of a state rule of forum convenience is not inconsistent with any traditional rule of admiralty reflecting a policy of uniformity. Second, the availability of a state forum to vindicate Jones Act and general maritime claims merely provides a supplemental remedy for rights determined by federal law; it does not subject vessel operators to conflicting standards of tort liability as they travel in interstate commerce. Third, a State's application of its own rule on the subject

[13] This Court has never addressed the preemptive effect of the federal doctrine of *forum non conveniens* in maritime cases. See *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 149-150 (1988) (adverting to but not resolving that question). Petitioner cites (Pet. 20 n.7) a number of lower court decisions applying the doctrine of *forum non conveniens* in admiralty. Aside from the Fifth Circuit decisions discussed below (see note 19, *infra*), none of the lower court cases cited by petitioner speaks to preemption of state rules of forum convenience.

is supported by federal statutory policies expressed in the Jones Act and the FELA.

### 1. *The traditional applicability of the doctrine of* forum non conveniens *in admiralty does not require preemption*

The doctrine of *forum non conveniens* has long been applied by federal courts in admiralty cases. See, *e.g.*, *Canada Malting Co.* v. *Paterson S.S., Ltd.*, 285 U.S. 413 (1932); *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 285-286 (1897); *The Belgenland*, 114 U.S. 355, 363-369 (1885); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 457 (1870); *Willendson* v. *Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682). That fact, however, should not result in the doctrine's treatment as a characteristic feature of admiralty law requiring uniformity.

First, the doctrine of *forum non conveniens* is not unique to admiralty. "Courts of equity and of law [have] also occasionally decline[d], in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting*, 285 U.S. at 423. Thus, as this Court has held, the doctrine generally applies to any case brought in federal court, including diversity cases governed by state law. See, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947); *Koster* v. (*American*) *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947).[14] And the doctrine

[14] In *Gulf Oil Corp.* v. *Gilbert*, *supra*, which established the applicability of the doctrine of *forum non conveniens* in diversity cases, Justice Black dissented based in part on his view that the doctrine of *forum non conveniens* had been applied in maritime cases "[f]or reasons peculiar to the special problems of admiralty." 330 U.S. at 513. The Court, however, found that the doctrine had been validly applied in a broad variety of cases in law and equity, and held that it could properly be applied in a district court sitting



has also been recognized as "part of the common law of many States." *Piper Aircraft*, 454 U.S. at 248 n.13. In fact, this Court has treated admiralty decisions defining the substance of *forum non conveniens* analysis as binding precedent in the nonmaritime context. See *Piper Aircraft*, 454 U.S. at 247-249 (treating the admiralty decision of *Canada Malting* as binding precedent in nonadmiralty diversity action). Those considerations, while not dispositive, confirm that the doctrine does not address policy concerns unique to admiralty.

Second, this Court's precedents confirm that the doctrine is generally administered by the federal courts as a discretionary rule of convenience, not as a substantive right belonging to those engaged in maritime commerce. The operative principle "is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.*, 330 U.S. at 507. In implementing that principle, this Court has refused to "lay down a rigid rule to govern discretion." *Piper Aircraft*, 454 U.S. at 249.[15] Rather, as the Court has made clear, "when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." *Id.* at 241 (quoting *Koster*, 330 U.S. at 524).

Because dismissal on grounds of *forum non conveniens* rests on a trial court's discretion—the exercise of which by the federal district courts is entitled to "substantial def-

in diversity. *Id.* at 504-505, 507-512. Indeed, even Justice Black acknowledged that the doctrine addressed problems of equity as well as admiralty. *Id.* at 513.

[15] For cases explaining the discretionary nature of the doctrine in maritime cases, see, *e.g.*, *The Maggie Hammond*, 76 U.S. (9 Wall.) at 457; *The Belgenland*, 114 U.S. at 365-366; *Napier Shipping Co.*, 166 U.S. at 285.

erence" and is reversible only for "clear abuse of discretion" (*Piper Aircraft*, 454 U.S. at 257)—that doctrine is one that inherently affords substantial leeway in its application. To be sure, the discretion exercised by trial courts is structured by certain factors identified by this Court.[16] But particularly in light of the Court's refusal to countenance assignment of "conclusive or [even] substantial weight" to any one factor in the analysis (*id.* at 250),[17] the discretionary nature of the doctrine leaves room, in many cases, for legitimate judicial disagreement. In light of that fact, it is difficult to maintain, as petitioner does, that uniform application is a crucial policy of the doctrine of *forum non conveniens*.

Third, in its traditional application in admiralty cases, the doctrine of *forum non conveniens* principally related to foreign parties. See, *e.g.*, *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 518 (1930); *The Belgenland*, 114 U.S. at 365-366; *The Maggie Hammond*, 76 U.S. (9 Wall.) at 457; *Mason* v. *Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804); see also *Napier Shipping Co.*, 166 U.S. at 285.[18] Indeed, as recently as 1950, this Court was able to observe that it had never had occasion to apply the doctrine "to a suit brought by a United States citizen" and that "[s]uch application has been rare even in the lower federal courts." *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 697 (1950).

Thus, although it is now clear that the doctrine of *forum non conveniens* is not confined to suits involving foreign parties (see, *e.g.*, *Gulf Oil Corp.* v. *Gilbert*, *supra*), the absence of any long-standing, widespread tradition of applying that doctrine in maritime suits between American citizens (see Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12, 46-47 (1949)) indicates that its unavailability in the circumstances of this case will not significantly impair the interests served by uniform maritime law. See *Madruga*, 346 U.S. at 562 ("The scarcity of reported cases involving [the] partition [of ships at the instance of majority owners] since the Constitution was adopted indicates that establishment of a national partition rule is not of major importance to the shipping world.").[19]

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[16] Generally speaking, the pertinent factors in *forum non conveniens* analysis are as follows:

> The factors pertaining to the private interests of the litigants include[] the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public factors bearing on the question include[] the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

*Piper Aircraft*, 454 U.S. at 241 n.6 (citation omitted).

[17] This Court has emphasized that "[e]ach case turns on its facts" and has repeatedly rejected the use of per se rules in applying the doctrine. *Piper Aircraft*, 454 U.S. at 249 (citation omitted); see, *e.g.*, *id.* at 246, 249-250; *Koster*, 330 U.S. at 527.

[18] This Court first adverted to such a doctrine in *Mason* v. *Ship Blaireau*, *supra*. There, Chief Justice Marshall, writing for the Court, noted that a question had been raised whether "upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners." 6 U.S. (2 Cranch) at 264. Noting that "the point does not appear to have been ever settled," the Court found it appropriate to exercise jurisdiction in a case where considerations of "public convenience" favored the exercise and "the parties assent[ed] to it." *Ibid.*

[19] Nor will traditional considerations of international comity (see *The Belgenland*, 114 U.S. at 363) play a role in a case, like the present one, that involves only parties and events within the United States. We note that each of the Fifth Circuit cases embracing a rule of preemption in this area has involved at least some

### 2. *Louisiana's open-forum rule permissibly supplies a forum for maritime claims without materially intruding upon the uniformity of maritime law*

In this case, Louisiana enacted a rule of forum convenience that, unlike the traditional rule, provides that once personal jurisdiction and venue are established, state courts are without discretion to decline to entertain a maritime case. In our view, that rule may stand under this Court's admiralty preemption cases.

In general, the Court is likely to find uniformity unnecessary where a state-law rule poses only a negligible risk of requiring vessel operators to comply with materially different measures of duty and liability as they travel in interstate or foreign commerce. Cf. *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924) (uniformity in maritime law was designed to prevent the "confusion and difficulty" that would result "if vessels were compelled to comply with the local statutes at every port").[20] Consequently, where a state law deals "merely

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foreign parties and/or events. See, *e.g.*, *Ikospentakis* v. *Thalassic S.S. Agency*, 915 F.2d 176, 177 (1990) (suit by Greek citizen against Panamanian corporation and other Greek citizen); *Quintero* v. *Klaveness Ship Lines*, 914 F.2d 717, 719 (1990) (Philippine sailor injured while unloading Liberian-registered, Norwegian-owned ship), cert. denied, 111 S. Ct. 1322 (1991); *Camejo* v. *Ocean Drilling & Exploration*, 838 F.2d 1374, 1375 (1988) (Brazilian plaintiff injured in Brazil; one of defendants was Brazilian entity); *Chick Kam Choo*, 817 F.2d at 309 (Singapore national killed in Singapore). In fact, in the leading case of *Chick Kam Choo*, the Fifth Circuit emphasized the foreign residence of the plaintiff. See, *e.g.*, 817 F.2d at 324 ("Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction."). This case does not present an occasion for deciding whether the doctrine, as applied to foreign parties, is a preemptive feature of admiralty law.

[20] This point is illustrated in the tort context by the so-called "maritime but local" doctrine, which allowed a State to apply its own compensation remedy to a maritime injury if an injured worker's employment was not directly related to commerce and navigation. See *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 306 (1983) (describing "maritime but local" doctrine); see, *e.g.*, *Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 276 U.S. 467, 468-469 (1928). For example, state law could be used to redress injuries to a carpenter on an unfinished vessel in navigable waters, because the rights and liabilities "had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922). In contrast, for employees injured or killed while repairing finished vessels, state compensation law was preempted. See, *e.g.*, *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457 (1925); *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479, 480-481 (1923). In the latter situation, a ship owner might face different duties or liabilities in every port visited; thus, "[t]he matter was not of mere local concern, * * * but had direct relation to navigation and commerce." *Robins Dry Dock*, 266 U.S. at 457.

Even where the standard of liability might vary, the Court in some instances has tolerated diversity if it has regarded the effect on uniformity as immaterial. For example, although the Court (prior to *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970)) did not recognize a general maritime right to recover for wrongful death (see *The Harrisburg*, 119 U.S. 199 (1886)), it authorized the States to provide for recovery for wrongful death in their own territorial waters. See, *e.g.*, *The Tungus* v. *Skovgaard*, 358 U.S. 588, 591 (1959); *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242 (1921); *Just*, 312 U.S. at 391 (survival-of-action law); see also *Kossick*, 365 U.S. at 739-740 (explaining the rationale for not preempting state wrongful death remedy).

[21] Petitioner does not even cite *Red Cross Line*, but relies (Br. 26-27) principally upon *Garrett* v. *Moore-McCormack Co.*, *supra*, for the proposition that deeply rooted rules of admiralty procedure are preemptive of contrary state law. The Court in *Garrett*



with the remedy in the state courts," without "modify[ing] the substantive maritime law" at issue, the doctrine of admiralty preemption does not require invalidation of the state law. *Red Cross Line*, 264 U.S. at 124.

In *Red Cross Line*, the Court held that a New York court could award specific performance of an arbitration clause in a maritime contract even though that remedy was unavailable under admiralty law.[21] As the Court

later explained, "since such clauses are valid in admiralty and their breach gives rise to an action for damages, to compel arbirtation is really to do no more than substitute a different and more effective remedy for that available in admiralty." *Kossick*, 365 U.S. at 740.

The reasons for sustaining Louisiana's forum convenience policy are, if anything, more substantial than the justification for sustaining the supplemental state remedy in *Red Cross Line*. When the nature of a remedy for a violation of a maritime right is at issue, there may be instances in which a "more effective" remedy will, in practice, alter the degree of care that a vessel operator

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held that a traditional federal maritime rule—assigning to a maritime tort defendant the burden of proving the validity of a release—preempts state law placing the burden on the plaintiff to prove its invalidity. But for several reasons, *Garrett* does not undermine the holding of *Red Cross Line* or warrant reversal of the judgment of the Supreme Court of Louisiana in this case. First, at issue in *Garrett* was the traditional maritime rule that seamen are "wards of admiralty" whose contracts are analogous to those between fiduciaries and beneficiaries; hence, it involved not only the allocation, but also the substance, of the shipowner's burden of proof. 317 U.S. at 247. In other words, unlike *Red Cross Line*, *Garrett* did not merely involve the State's provision of a remedy for a right guaranteed in admiralty. Second, this Court has explained that where a maritime contract "may well have been made anywhere in the world," its validity "should be judged by one law wherever it was made." *Kossick*, 365 U.S. at 741 (state statute of frauds preempted); see, *e.g.*, *Garrett*, 317 U.S. at 244; *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 313-314 (1919); cf. *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U.S. 490, 495 (1923) (standard for breach); but cf. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314-321 (1955). Without that uniformity, it would be difficult if not impossible for shipowners and their employees to contract for predictable and uniform rights. Third, as discussed above, to the extent that the doctrine of *forum non conveniens* is a "[d]eeply rooted" (*Garrett*, 317 U.S. at 249) characteristic of maritime law, it is one that traditionally applied when foreign parties sought to invoke the aid of this Nation's courts.



exercises in traveling from State to State[22]—thereby creating the very "confusion and difficulty" (*W.C. Dawson & Co.*, 264 U.S. at 228) that a uniform maritime law is designed to address. That is not even a potential concern here. Louisiana's open-forum statute does not add to or subtract from substantive maritime rights, duties, or remedies; the general maritime law and the Jones Act supply the duty of care and measure of liability, whether this suit proceeds in Louisiana or Pennsylvania. Pet. App. A17-A18.[23] To the extent that either State might seek to apply its substantive law in adjudicating this action, the legitimacy of its doing so would be subject to independent scrutiny under the principle of maritime uniformity. In light of those limitations, the State's legitimate interest in adopting its own policies governing access to its courts should not be displaced.[24]

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[22] For example, in *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 382-384 (1918), the Court held that a seaman injured at sea could recover only the general maritime remedies of wages and maintenance and cure, and could not recover the full indemnity available under state law. In so holding, the Court reasoned that substituting the state-law measure of relief "would distinctly and definitely change or add to the settled maritime law." *Id.* at 382.

[23] For a discussion of the factors used in determining the applicability of the Jones Act and the general maritime law, see, *e.g.*, *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 308-309 (1970); *Romero*, 358 U.S. at 381-382; *Lauritzen* v. *Larsen*, 345 U.S. 571, 583-592 (1953).

[24] See, *e.g.*, *Mayfield*, 340 U.S. at 3-4 (state law may accept or reject doctrine of *forum non conveniens* as a matter of state policy in FELA cases); *Bainbridge*, 287 U.S. at 280 (Jones Act cases in state court are not governed by Jones Act venue provision; "we should be slow to impute to Congress an intention * * * to interfere with the statutory provisions of the various states fixing the venue of their own courts"); cf. *Stewart Organization*, 487 U.S. at 32 (holding that federal transfer-of-venue provisions set forth in 28 U.S.C. 1404(a) govern in diversity actions, and rejecting the claim that state choice-of-forum policies must be applied under *Erie*).

Where a State merely provides a forum for remedying a maritime tort, "the intrusion into federal interests [is] so minimal" (*Hess* v. *United States*, 361 U.S. 314, 334 n.13 (1960) (Harlan, J., dissenting)) that it is possible, without substantial risk to uniformity,[25] to accommodate the State's interest in having its courts open to maritime claimants. Indeed, because the doctrine of *forum non conveniens* presupposes that exercise of jurisdiction would comport with due process, there is little danger that an

[25] Petitioner argues (Br. 20-21) that the application of state rules of forum convenience will lead to multiple litigation and forum shopping, because a plaintiff whose maritime action is dismissed on grounds of *forum non conveniens* in federal court may simply cross the street to a more favorable state forum. That contention, however, does not undermine our submission. First, as discussed above (see note 11, *supra*), the doctrine of maritime preemption does not focus on forum shopping between state and federal court, but on the need for uniform standards of duty and liability in the diverse geographical venues that a vessel operator may enter. That concern is not implicated where, as here, a finding of nonpreemption will merely affect the availability of a forum, without affecting the applicability of the Jones Act and the general maritime law. Second, in a case such as this one, where all the parties and potential fora are within the United States, it is doubtful that a finding of preemption would eliminate the possibility of forum shopping in any event. Since the 1948 revision of the Judicial Code, a federal court defendant wishing to transfer a lawsuit to a more convenient forum within the United States must file a motion to transfer venue under 28 U.S.C. 1404(a), not a motion to dismiss on *forum non conveniens* grounds. See *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955); see also *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960). And because *forum non conveniens* analysis is similar to, but not the same as, that under Section 1404(a) (see, *e.g.*, *Piper Aircraft*, 454 U.S. at 253; *Norwood*, 349 U.S. at 32), a federal court's ruling under Section 1404(a) would not bar a state court's contrary application of a traditional version of *forum non conveniens*. Cf. *Parsons* v. *Chesapeake & O. Ry.*, 375 U.S. 71, 73-74 (1963) (per curiam) (FELA case holding that "prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power" under Section 1404(a)).



open forum policy will materially prejudice the federal interests protected by a uniform system of maritime law.[26]

The "strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction * * * under circumstances that would offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 113 (1987) (quoting *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 316 (1945)). That principle, in turn, requires a court to "consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. [A court] must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" *Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980)). Those considerations —which are analogous to factors considered under the doctrine of *forum non conveniens*—offer substantial assurance that a state court's assertion of jurisdiction will not unreasonably burden an entity operating in maritime commerce. Petitioner has not shown that, in addition, a non-constitutional federal rule of forum convenience is needed to protect vessel operators from undue litigation burdens as they ply their trade from State to State.[27]

[26] Petitioner argues (Br. 23 n.12) that in this case, there are no local interests being vindicated by the adjudication of the present action in Louisiana court. Whatever the merits of that contention, the trial court held that there was a sufficient basis for Louisiana to assert personal jurisdiction (Pet. App. A3), and petitioner did not contest that determination on appeal. Thus, it must be assumed for present purposes that the State has a constitutionally sufficient interest in adjudicating this case.

[27] We believe that the Fifth Circuit erred in asserting that a preemptive federal doctrine of *forum non conveniens* is necessary because "maritime actors, by the nature of their business, cannot avoid sufficient 'minimum contacts' to subject themselves to the jurisdiction of many nations" and the "jurisdictional minima"

### 3. *Federal statutory policies confirm the validity of Louisiana's application of its own forum convenience rules to Jones Act and general maritime tort cases*

As this Court has explained, federal enactments in related areas are a source of policy guidance for the courts in fashioning federal rules of admiralty law. See *Miles*, 498 U.S. at 27 ("We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court

established by this Court "are not enough to protect [them]." *Chick Kam Choo*, 817 F.2d at 322. Indeed, this Court's precedents point strongly in the opposite direction. First this Court has made clear that when a claim does not arise out of, and is unrelated to, a defendant's activities in a State, jurisdiction over a nonresident corporation may be asserted only if the company has "continuous and systematic general business contacts" with the State. *Helicopteros Nacionales*, 466 U.S. at 415-416. Thus, it is unlikely that a shipping company's passing commercial contacts within a State will suffice to support personal jurisdiction over a claim unrelated to the State. See *id.* at 414-415 (describing the "continuous and systematic" contacts necessary to sustain "general jurisdiction"). Second, the Due Process Clause provides heightened protection in the area traditionally of greatest concern to admiralty courts in applying the doctrine of *forum non conveniens*—cases involving foreign parties. See *Asahi*, 480 U.S. at 114 (in lawsuit involving foreign defendants, the "unique burdens" of defending a lawsuit abroad have "significant weight" in due process analysis); *id.* at 115 (interests of foreign governments and federal interest in "foreign relations policies" are served "by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State"). Third, a vessel operator may mitigate the risk of potentially burdensome litigation by bargaining for a reasonable forum-selection clause in its maritime contracts. See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); see also *Kossick*, 365 U.S. at 735, 741 (maritime contracts that are not of a strongly "local" nature are governed by uniform federal law).



should look primarily to these legislative enactments for policy guidance."); see also *Moragne*, 398 U.S. at 393-396, 400-402.[28] With regard to the question presented here, this Court's interpretation of the Jones Act and the FELA indicates that Congress has not generally required States to apply federal rules of forum selection for suits otherwise governed by a uniform body of federal substantive law. Because Congress has shown particular solicitude for the plaintiff's choice of forum under the Jones Act and the FELA, it would be a particularly unwarranted exercise of federal common law making power to engraft a special layer of federal protection for maritime defendants when Congress has declined to do so.

a. The Jones Act provides that venue is proper in "the district in which the defendant employer resides or in which his principal office is located."[29] 46 U.S.C. App. 688(a). In *Bainbridge* v. *Merchants & Miners Transportation Co.*, *supra*, the Court held that Section 688(a) does not govern venue in Jones Act suits filed in state court. 287 U.S. at 280-281. Rather, the Court determined that "venue [in Jones Act cases] should * * * be[] determined by the trial court in accordance with the law of the state." *Id.* at 281.[30]

[28] Although the Court in *Miles* and *Moragne* looked to state as well as federal statutory policies in determining the content of admiralty law, the issue in this case—whether state law should be preempted on a particular issue—has no analogy in state law itself, and must be determined by consulting appropriate federal statutory analogies.

[29] Although Section 688(a) refers to "jurisdiction," this Court has explained that the provision regulates venue rather than subject matter jurisdiction. See *Pure Oil Co.* v. *Suarez*, 384 U.S. 202, 203 (1966); *Vasquez*, 271 U.S. at 561-562.

[30] The plaintiff in *Bainbridge* filed suit in Philadelphia County, Pennsylvania, but his employer's principal office was in Baltimore, Maryland. 287 U.S. at 279. The state court dismissed the action on the ground that venue was improper under Section 688(a). This Court reversed, holding that the federal rule did not bind the state court.

Although *Bainbridge* does not squarely address the doctrine of *forum non conveniens*, it does indicate either that Congress regarded venue under the Jones Act as a matter of judicial housekeeping that should be federally prescribed only for the federal courts, or that the States' interest in regulating their own dockets outweighs any need for a uniform venue policy in state and federal courts.[31] Further, the Court's construction of Section 688(a) was premised in part on the view that venue in state courts, even for federal maritime causes of action, is presumptively a matter of state law under our federal system. See *Bainbridge*, 287 U.S. at 281.

The Jones Act's policy favoring state control over rules of forum selection should apply equally to actions for personal injury brought under the general maritime law. Because a general maritime claim of unseaworthiness and a Jones Act claim alleging negligence are merely "alternative 'grounds' of recovery for a single cause of action," a judgment on a claim "for unseaworthiness [is] * * * a complete 'bar' to [a] subsequent action for the same injuries under the Jones Act." *McAllister*, 357 U.S. at 224-225. Accordingly, a plaintiff must bring both claims "to make full utilization of his remedies for personal injury." *Id.* at 225. Because the Jones Act's policies concerning forum selection can be effective only if they apply equally to maritime claims that must be raised in the same lawsuit, it would create an unnecessary anomaly (cf. *Moragne*, 398 U.S at 395-396) to implement differ-

[31] This Court's decision in *Romero* v. *International Terminal Operating Co.*, *supra*, further supports that conclusion. In holding that an action filed in state court under the "saving to suitors" clause was not removable to federal court, the Court emphasized "the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal." 358 U.S. at 371. That policy, the Court found, was also incorporated into the Jones Act. See *id.* at 371 n.29. Congress could easily embrace the forum convenience policies advanced by petitioner simply by making general maritime and Jones Act actions removable to federal court.



ent policies for the adjudication of unseaworthiness claims under general maritime law.[32]

b. This Court's construction of the FELA in *Missouri ex rel. Southern Ry.* v. *Mayfield*, *supra*, also supports the view that maritime commerce does not require a uniform rule of forum selection. Under the FELA, state courts must apply uniform federal law in determining whether a railroad is liable to its employees for personal injuries. *Garrett*, 317 U.S. at 244. The Court held in *Mayfield*, however, that state courts are not required to adhere to a uniform federal doctrine of *forum non conveniens* in lawsuits under the FELA. 340 U.S. at 3-4.[33]

[32] Because Jones Act negligence, unseaworthiness, and maintenance and cure are common avenues of relief for a seaman's maritime injuries, a seaman will "rarely" forgo the right "to sue for all three." *McAllister*, 357 U.S. at 224. Accordingly, if a State's forum selection policy is to be respected with regard to claims of Jones Act negligence and unseaworthiness, it would create an unnecessary disuniformity in a seaman's right to recover for maritime injuries if his claim for maintenance and cure could be dismissed on *forum non conveniens* grounds.

[33] In sustaining the application of the State's *forum non conveniens* policy, the Court in *Mayfield* remarked that the State enforced its policy "impartially" without "discriminat[ing] against [FELA] suits." 340 U.S. at 4. Although no such claim has been raised by petitioner, we note that the *Mayfield* Court's caveat is not implicated by the fact that Article 123(C) makes the doctrine of *forum non conveniens* unavailable only in cases brought under the Jones Act or federal maritime law. Because Article 123 is the exclusive source of authority for the Louisiana state courts to dismiss suits on *forum non conveniens* grounds (*Fox* v. *Board of Supervisors*, 576 So. 2d 978, 986-991 (La. 1991)), and because Article 123 does not authorize dismissal of state law claims, there is in fact no discrimination, as relevant here, between state law claims and Jones Act and general maritime claims. To be sure, Article 123(B) appears to authorize dismissal of certain federal claims on *forum non conveniens* grounds in circumstances in which state claims could not be dismissed. But for the reasons discussed above, any concern raised by that provision's unequal treatment of state and federal claims (see *Testa* v. *Katt*, 330

We see no reason why the Court should depart from the nonpreemption principle adopted in *Mayfield*. First, *Mayfield* establishes that Congress has determined that the federal interest in uniform law governing the tort liability of railroad employers in interstate commerce (see *Garrett*, 317 U.S. at 244) does not require a uniform rule of forum convenience. That congressional policy is instructive in determining whether a uniform policy of forum convenience is needed to effectuate the comparable federal interest in a uniform law governing the tort liability of shipping employers in interstate commerce. Second, the relevance of *Mayfield* is particularly strong because the Jones Act—which governs maritime employees' personal injury claims against shippers—"is based upon, and incorporates by reference, the [FELA]," and the FELA has been cited as a source of the Jones Act's uniformity requirement. *Garrett*, 317 U.S. at 244; see 46 U.S.C. App. 688(a); see also note 5, *supra*.[34] We see no basis for finding that Congress's forum selection policies under the FELA should have less force in the context of a related federal statute, the Jones Act, whose critical features are explicitly borrowed from the FELA.

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U.S. 386 (1947)) is inapposite where Jones Act or general maritime claims are concerned.

[34] Amicus MLA argues (Br. 16-17) that the FELA case law is inapposite because the Jones Act does not incorporate every aspect of the FELA and because petitioner has also [illegible]d a general maritime claim. The FELA precedent, however, provides a very close analogy because the FELA provides for a uniform scheme of substantive law that is the basis for the Jones Act scheme. As discussed in the text, moreover, this Court's precedents suggest that the Jones Act's forum selection policies should govern in general maritime tort actions as well.



## CONCLUSION

The judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted.

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JULY 1993

## APPENDIX

1. 28 U.S.C. 1333 provides in pertinent part as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * * * *

2. The Jones Act, 46 U.S.C. App. 688, provides in pertinent part as follows:

> (a) Application of railway employee statutes; jurisdiction
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

* * * * *

3. La. Code Civ. Proc. Ann. art. 123 (West Supp. 1993) provides:

> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent juris-

diction and proper venue, shall be transferred to any other court pursuant to this Article.

B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 [U.S.C. App.] § 688 or federal maritime law.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60321

Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

No. 91-1950

IN THE

# Supreme Court of the United States

OCTOBER TERM 1992

AMERICAN DREDGING COMPANY,

*Petitioner,*

—v.—

WILLIAM ROBERT MILLER,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

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## QUESTION OF LAW PRESENTED

Whether the doctrine of *forum non conveniens* as applied by the federal courts in admiralty cases must be applied to maritime claims filed in state courts.

## TABLE OF CONTENTS

PAGE

Question of Law Presented ..... i

Table of Authorities ..... iv

Interest of *Amicus Curiae* ..... 2

Summary of the Argument..... 5

Argument ..... 6

I. THE DOCTRINE OF *FORUM NON CONVENIENS* IS A NECESSARY COROLLARY TO THE SCOPE OF THE MARITIME JURISDICTION AND ITS ABROGATION MATERIALLY IMPAIRS THE RIGHTS OF THE PARTIES AND THE EFFICIENCY OF THE FEDERAL COURTS ..... 6

II. UNDER THE CONSTITUTION, THE STATES LACK POWER TO ALTER CHARACTERISTIC FEATURES OF THE FEDERAL MARITIME LAW 9

III. THE DOCTRINE OF *FORUM NON CONVENIENS* IS A "CHARACTERISTIC FEATURE" OF THE MARITIME LAW WHICH MUST BE APPLIED IN ALL MARITIME CASES ..... 11

IV. APPLICATION OF THE *FORUM NON CONVENIENS* DOCTRINE CANNOT BE AVOIDED BY CHARACTERIZING IT AS "PROCEDURAL." .... 14

V. ALTHOUGH THE INSTANT CASE INVOLVES UNITED STATES LITIGANTS AND FORA, ITS PRECEDENTIAL EFFECT IS INTERNATIONAL . 18



PAGE

VI. THIS COURT SHOULD NOT ENDORSE FORUM SHOPPING ..... 19

Conclusion..... 19

Proof of Service by Mail ..... 20

## TABLE OF AUTHORITIES

**Cases:** PAGE

*Alcoa Steamship Co. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980) ..... 6, 12, 13

*Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) ..... 12

*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) ..... 4

*Bainbridge v. Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932) ..... 16, 17

*Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949) ..... 12

*Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 1980 AMC 1993 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) ..... 12

*Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988) ..... 8

*Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932) ..... 12

*Chick Kam Choo v. Exxon Corp.* 486 U.S. 140 (1988) ... 4

*Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. 14th Dist. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992) ..... 8, 12

*Galban Lobo Trading Co. v. Canadian Leader Ltd.*, 1963 AMC 988 (S.D.N.Y. 1958) ..... 12



PAGE

*Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) ..... 14-15

*Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, 61 U.S.L.W. 3256 (1992) ..... 5, 7

*Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) ..... 15

*Hanna v. Plumer*, 380 U.S. 460 (1965) ..... 15

*Ikospentakis v. Thelassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990) ..... 7-8, 11-12

*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) . 10

*Lindgren v. United States*, 281 U.S. 38 (1930) ..... 11

*Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F. Supp. 579, 1985 AMC 2381 (N.D. Cal. 1985) .... 12

*Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950) ..... 15-17

*Ocean Shelf Trading v. Flota Mercante Grancolumbiana*, 638 F. Supp. 249, 1986 AMC 2482 (S.D.N.Y. 1986). 12

*Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) ..... 4

*Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924).. 14

*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953) ..... 13

*Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) ..... 4

*Red Sea Insurance v. S.S. LUCIA DEL MAR*, 1983 AMC 1630 (S.D.N.Y. 1982), *aff'd*, 1983 AMC 1631 (2d Cir. 1983) ..... 12

*Sisson v. Ruby*, 497 U.S. 358 (1990) ..... 4, 18

*Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) .... 11

PAGE

*Southland v. Keating*, 465 U.S. 1 (1984) ..... 11

*Testa v. Katt*, 330 U.S. 386 (1947) ..... 10

*The HINE v. Trevor*, 71 U.S. (4 Wall.) 555 (1867) .....10-11

*The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1875) .....9-10

*The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867) ....10, 13

*The WILJA*, 113 F.2d 646 (2d. Cir.), *cert. denied sub nom. O/Y Wipu v. Dreyfus*, 311 U.S. 687 (1940) ..... 12

*Tramp Oil v. MERMAID I*, 743 F.2d 48, 1985 AMC 459 (1st Cir. 1984) ..... 12

*Wall Street Traders Inc. v. Sociedad Espanola de Construccion Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964)..... 12

*Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682) ..... 12

**Constitution:**

United States Constitution, Art. I, § 8, cl. 3 ..... 9

United States Constitution, Art. III, § 2, cl. 3..... 9

United States Constitution, Art. VI, § 2..... 9

**Statutes:**

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... 2

Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376..... 3

United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073 ..... 3



PAGE

Jones Act, 46 U.S.C. App. § 688.....6, 16

Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315..... 2

LA. CODE CIV. PROC. ANN. art. 123 (West Supp. 1992) .....6, 13, 16

**Conventions and Treaties:**

Assistance and Salvage Convention (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 4-1 (7th rev'd ed. 1993) ("BENEDICT")... 3

Civil Liability for Oil Pollution Damages Convention (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3..... 3

Collision Convention (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2..... 3

Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 ..... 3

Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 .... 3

Maritime Liens and Mortgages Convention (1967), *reprinted in* 6C BENEDICT, Doc. No. 15-5 ..... 3

1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT, Doc. No. 3-4..... 3

Ocean Bills of Lading Convention (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1..... 3

PAGE

**Regulations:**

33 C.F.R. ch. 1, subch. D, Special Note (1987) ..... 3

**Other:**

Maritime Law Association of the United States ("MLA") Articles of Incorporation ..... 2

MLA Resolutions:

MLA Minutes, MLA Doc. No. 588 (1975) ..... 4

MLA Minutes, MLA Doc. No. 669 (1986) ..... 4

MLA Report, MLA Doc. No. 671 (1987) ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM 1992

**No. 91-1950**

AMERICAN DREDGING COMPANY,

*Petitioner,*

—v.—

WILLIAM ROBERT MILLER,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioner, American Dredging Company ("Petitioner"). Both Petitioner and Respondent have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

## INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899 and incorporated in 1993. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-three years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-16.



MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some fifty national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

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3 *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Russian Federation, Senegal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay and Venezuela.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2; Maritime Liens and Mortgages (1967), *reprinted in* 6C BENEDICT, Doc. No. 15-5; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4.

MLA believes uniformity in maritime law, both national and international, is essential. Concern for uniformity has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. Application of state open-forum statutes to maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. The Louisiana court's holding also perpetuates the now chronic conflict between Louisiana and Texas

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *E.g.*, *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).



State Courts and the United States Court of Appeals for the Fifth Circuit.

Apart from the inherent problems arising from uncertainty in the application of a federal door-closing measure, there is the risk that state courts will disregard other elements of admiralty law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, 61 U.S.L.W. 3256 (1992) (applying state strict liability statute to maritime tort). Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and consequently the practices of MLA's attorney members and the affairs of their clients.

## SUMMARY OF ARGUMENT

The doctrine of *forum non conveniens* is a necessary corollary to the extraordinary scope of the admiralty jurisdiction. Allowing States to abolish the maritime doctrine of *forum non conveniens* in maritime actions brought in state courts fundamentally prejudices the rights of all maritime defendants and violates the constitutional requirement of uniform treatment of maritime claims. Condoning the result reached by the Louisiana Supreme Court would also encourage federal courts, which might otherwise remand or stay their own proceedings, to retain jurisdiction to preserve the rights of maritime defendants, further burdening the federal system. States are without power to alter the characteristic features of maritime law. *Forum non conveniens*, whether it is deemed substantive or procedural, is a characteristic feature of the general maritime law, and its application is mandated regardless of the court in which the claim is brought. Inconsistency in the availability of a *forum non conveniens* defense adversely affects international as well as American interests. Finally, by allowing the decision to stand, this Court would be endorsing forum shopping of the rankest order.

## ARGUMENT

### I

### THE DOCTRINE OF *FORUM NON CONVENIENS* IS A NECESSARY COROLLARY TO THE SCOPE OF MARITIME JURISDICTION AND ITS ABROGATION MATERIALLY IMPAIRS THE RIGHTS OF THE PARTIES AND THE EFFICIENCY OF THE FEDERAL COURTS.

The doctrine of *forum non conveniens* was developed in response to the exceptional scope of the maritime jurisdiction: In view of the plethora of fora in which maritime defendants may be found subject to jurisdiction, a counterbalancing limitation on the exercise of that jurisdiction was necessary to avoid impositions on the courts and the parties. *Alcoa Steamship Co. v. M/V NORDIC REGENT*, 654 F.2d 147, 154 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980).

It is indeed essential to preserve the scope of maritime defendants' exposure to jurisdiction wherever they may be found in order to allow the enforcement of valid claims against necessarily peripatetic maritime actors. It is, however, equally essential to preserve the vitality of the concomitant doctrine that allows the actual preparation and trial of a case to go forward in the most appropriate forum.

Without reversal by this Court, this and other maritime defendants will continue to be prejudiced by Louisiana's refusal to apply the *forum non conveniens* doctrine.[9] Having to

[9] The Louisiana statute grants *forum non conveniens* relief to non-maritime defendants. LA. CODE CIV. PROC. ANN. art. 123(A)-(C) (West Supp. 1992). Under the Louisiana statute, only "claims brought pursuant to [the Jones Act,] 46 [U.S.C. App.] § 688 or federal maritime law" are ineligible for *forum non conveniens* dismissal. LA. CODE CIV. PROC. ANN. art. 123(C). Maritime defendants are thus singled out and doubly disadvantaged in being deprived of both the state and federal doctrines of *forum non conveniens*.



defend a case in a place remote from the parties, the witnesses and all the other evidence (including in the instant case the vessel on which the accident allegedly occurred), vastly increases the cost and effort of participating in legal proceedings.[10] In the case at bar, these burdens to the defendant are not even offset by any legitimate need of the plaintiff, who himself has no connection with the forum, unless, of course, the cost of defending a case in a distant location encourages the defendant to pay more in settlement to avoid inordinate expenses.

Although their burden is not so immediately apparent, the federal courts will also continue to suffer if the decision below stands. For example, in *Ikospentakis v. Thelassic Steamship Agency*, 915 F.2d 176, 180 (5th Cir. 1990), the Fifth Circuit refused to allow a voluntary dismissal of a federal action because the plaintiff then would have proceeded in a state court in which the doctrine of *forum non conveniens* would not be applied, stating:

> That the [*forum non conveniens*] defense is available to [defendants] and that it would be "stripped" from them in Louisiana state court, albeit in violation of the constitution's supremacy clause, are equally certain propositions. . . .
>
> . . . At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous rule would blink at reality

[10] Increased cost and the possibility of not having access to essential evidence—for example, the vessel on which plaintiff was allegedly injured—may not be the only prejudice suffered by maritime defendants deprived of recourse to the *forum non conveniens* doctrine. While in theory any court is required to apply the same federal maritime rules to the merits of the claim, state courts have been known to substitute state substantive rules for established maritime law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, 61 U.S.L.W. 3256 (1992) (applying state strict liability statute to maritime tort). The defendant here is exposed to that risk as well.

> and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result.

*Id.* at 178, 180. The Fifth Circuit's willingness to accept a burden on its docket in lieu of unjustly burdening a litigant is a laudable illustration of that court's allegiance to justice, but these burdens on courts and litigants need not exist if maritime litigants could expect to receive the same treatment in state court as they would in federal court, as required by the Constitution. *See* Points II-IV, *infra* at 9-17; n.10, *supra* at 7. Unfortunately, such treatment cannot be expected if the States are free to circumvent the doctrine of *forum non conveniens* in maritime actions.

A further detriment to United States courts would result from a confirmation of the conflict between the state and federal courts[11] on the applicability of *forum non conveniens*: The forum shopping necessarily attendant to the conflict will continue to engender the wasteful procedural jockeying that has already consumed an inordinate amount of judicial time and attention. *See, e.g., Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. 14th Dist. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992).

There is a grave need for uniform application of the *forum non conveniens* doctrine in maritime cases because of the number of fora in which maritime defendants may be jurisdictionally "found." The prejudice and costs of engaging in a long-distance defense in a state court are as great as these burdens would be in an inconvenient federal court, and there is no justification for withholding the relief which federal law grants to maritime defendants and which even Louisiana allows to all nonmaritime defendants.

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[11] For discussion of the conflict, see, *e.g., Ikospentakis*, 915 F.2d 176; *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988).



## II

## UNDER THE CONSTITUTION, THE STATES LACK POWER TO ALTER CHARACTERISTIC FEATURES OF THE FEDERAL MARITIME LAW.

The number of places in which a maritime defendant may be legitimately haled into court was taken into account not only in the development of the *forum non conveniens* doctrine, but also, first and foremost, in the Constitution's allocation of powers between the state and federal governments. Because maritime activity would be chaotic without uniformity and reliability in the governing law, the Constitution places maritime law and jurisdiction in the hands of the national government, the Admiralty Clause mandating that "all Cases of admiralty and maritime Jurisdiction" fall to the "judicial Power of the United States," U.S. CONST., art. III, § 2, cl. 3, and the Commerce Clause assigning to the national legislature "the power . . . To regulate commerce with foreign Nations, and among the several States . . . ." U.S. CONST., art. I, § 8, cl. 3. Both clauses speak expressly in terms of "power." That these constitutional commands are dealing directly with the apportionment of competence between the state and federal governments is made clear by the Supremacy Clause, which makes the Constitution "the Supreme Law of the Land," and prescribes that "the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, § 2.

The Supreme Court's 1874 decision in *The LOTTAWANNA* explains the practical need for uniformity as the basis for the Constitution's allocation of power to the federal government for all maritime issues:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those

> relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
>
> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) 558, 575 (1875).

This Court has repeatedly stressed that "national control" is a constitutional requirement with consequent limitations on state power:

> [The Constitution] *took from the States all power*, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, *characteristic features* of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and *bring them within control of the Federal Government was the fundamental purpose* . . . .

*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (emphasis added).

In *Testa v. Katt*, 330 U.S. 386 (1947), the United States Supreme Court held that state courts which lacked jurisdiction under state law to hear federal claims could be required by federal law to hear them nonetheless. Conversely, a state legislature lacks power to keep state courts open to hear claims for which they have been deprived of jurisdiction by federal law. *See The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867); *The*



*HINE v. Trevor*, 71 U.S. (4 Wall.) 555 (1867); *Lindgren v. United States*, 281 U.S. 38, 47 (1930); *Southland v. Keating*, 465 U.S. 1, 15-16 (1984).

Neither courts nor legislatures can confer a power on the States which is denied to them in the Constitution, and the Constitution's requirement of national uniformity in maritime cases deprives the States of the power to interfere with the characteristic features of maritime law or to impair national uniformity in suits within the admiralty jurisdiction.

## III

## THE DOCTRINE OF *FORUM NON CONVENIENS* IS A "CHARACTERISTIC FEATURE" OF THE MARITIME LAW WHICH MUST BE APPLIED IN ALL MARITIME CASES.

The concept of uniformity involves the issue of competence in a federalist system and, as is the case with all such fundamental issues, is difficult to define once and for all. *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). Still, it is clear that

> no [state] legislation is valid if it . . . works material prejudice to the *characteristic features* of maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

*Id.* (emphasis added).

The doctrine of *forum non conveniens* has been specifically held to be a "characteristic feature" of the maritime law. *Ikospentakis*, 915 F.2d at 178 ("This court has recognized that *forum non conveniens* is a 'characteristic feature' of maritime

law, tracing its history back to the earliest decisions of the federal courts."). *Accord*, *Exxon*, 817 F.2d at 318, 323-24. ("The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law."). This Court's first enunciation of the doctrine was in an admiralty suit. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932). Admiralty and maritime law is the "source" of the *forum non conveniens* doctrine and "it is in the field of admiralty that our federal courts have applied the doctrine of *forum non conveniens* most flexibly and over the longest period of time." *Alcoa*, 654 F.2d at 154, 153. In addition to its origin and venerable 190-year history in maritime courts, *see Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682), the breadth of the doctrine's application to cases in all substantive areas of maritime law illustrates its place as an integral feature of the maritime law of the United States. *See, e.g., Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949) (salvage); *Tramp Oil v. MERMAID I*, 743 F.2d 48, 1985 AMC 459 (1st Cir. 1984) (maritime lien); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 1980 AMC 1993 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) (breach of marine insurance contract); *The WILJA*, 113 F.2d 646 (2d. Cir.), *cert. denied sub nom. O/Y Wipu v. Dreyfus*, 311 U.S. 687 (1940) (breach of charter party); *Ocean Shelf Trading v. Flota Mercante Grancolumbiana*, 638 F. Supp. 249, 1986 AMC 2482 (S.D.N.Y. 1986) (collision); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F. Supp. 579, 1985 AMC 2381 (N.D. Cal. 1985) (products liability for negligent design of ship's engine); *Red Sea Insurance v. S.S. LUCIA DEL MAR*, 1983 AMC 1630 (S.D.N.Y. 1982), *aff'd*, 1983 AMC 1631 (2d Cir. 1983) (cargo loss); *Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) (general average); *Wall Street Traders Inc. v. Sociedad Espanola de Construccion Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964) (breach of ship conversion contract); *Galban Lobo Trading Co. v. Canadian Leader Ltd.*, 1963 AMC 988 (S.D.N.Y. 1958) (breach of contract of carriage).



In arguing, contrary to federal circuit court authority, that *forum non conveniens* is not "characteristic" of the maritime law because other bodies of law have also adopted the doctrine, *see* Brief for the United States as *Amicus Curiae* (opposing the Petition for Certiorari) at 11-12, the Solicitor General has confused "characteristic" with "exclusive." Certain features of maritime law are indeed exclusive, such as the exercise of *in rem* jurisdiction over vessels, *see, e.g., The MOSES TAYLOR*, 71 U.S. 411, but the borrowing and eventual incorporation of traditional maritime tenets into other bodies of law, both state and federal, does not deprive such tenets of their status as characteristic features of maritime law. For example, comparative negligence has long been a characteristic feature of maritime law, *see, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953), and the fact that state law, in the main, has now moved to this position from a contributory negligence framework, does not alter comparative negligence's status as a characteristic feature of maritime law. The rules associated with unseaworthiness may have been the first form of strict liability, which has now become part of the fabric of our state and national laws. Similarly, the current acceptance by many of the States—including Louisiana in all nonmaritime cases, LA. CODE CIV. PROC. ANN. art. 123(A)(B)—of the doctrine of *forum non conveniens* does not alter its status as a characteristic feature of maritime law, especially since the doctrine has its source in maritime law. *See Alcoa*, 654 F.2d at 153-54.

Because the doctrine of *forum non conveniens* is a characteristic feature of maritime law, it should be applied in all maritime cases, regardless of the court in which the action is brought, in order to preserve the uniformity and harmony mandated by the Constitution. A "preemption" analysis is insufficient: The Constitution prevents the States from impairing uniformity *or* modifying or withholding characteristic features of maritime law, even if the federal law does not expressly declare itself to be preemptive. *Forum non conveniens*, being so intimately connected with admiralty jurisdiction itself, is

one of the characteristic features of maritime law in which uniformity is essential, and in which state interference would work great harm. Accordingly, the decision below must be reversed.

## IV

## APPLICATION OF THE *FORUM NON CONVENIENS* DOCTRINE CANNOT BE AVOIDED BY CHARACTERIZING IT AS "PROCEDURAL."

To say that the principle of uniformity ought to be limited to "substance" and denied to "procedure" does not resolve the question here.

The importance of federal control of all aspects of maritime cases was the basis for the Court's decision in *Panama Railroad Co. v. Johnson*:

> The framers of the Constitution were familiar with that [admiralty] system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but *to place the entire subject*—its substantive as well as *its procedural features—under national control* . . . .

264 U.S. 375, 386 (1924) (emphasis added).

State "procedural" rules have been expressly rejected in maritime cases, even when the suit has been brought in state court. *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). In *Garrett*, a case brought in the Pennsylvania state courts, this Court ruled that the federal maritime rather than state rule must govern on a burden of proof issue:

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny federal rights . . . .



* * *

> The right of petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted as that right is, it was part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.

*Id.* at 245, 249. In many maritime cases, procedure is as important as substantive law.

This Court has rejected the use of the epithet "procedural" as a means of deciding cases:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which is used.

*Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court reaffirmed its view that the dichotomy between "substance" and "procedure" was not adequate for deciding cases, while making clear that the criterion of "outcome-determination" is also not a universal rule.

In both *Guaranty Trust* and *Hanna*, the Court stressed the discouragement of forum-shopping as a ground for looking beyond the common epithets in deciding whether federal or state standards should be applied. Both cases indicate that the disparaging adjective "procedural" should not be used to reject a doctrine that is characteristic of the maritime law which governs this case.

Arguments based on the treatment of procedural issues in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1

(1950), and *Bainbridge v. Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932), simply miss the point. In interpreting the Federal Employers' Liability Act, the Court held in *Mayfield* only that a state court may choose not to exercise the jurisdiction granted to it by FELA as long as the court does so in an even-handed manner.[12] 340 U.S. at 4. No element of the Jones Act or the maritime law was at issue, and nothing in *Mayfield* or subsequent federal court decisions indicates that the Jones Act's incorporation of some of FELA's remedial provisions permits the rejection of *forum non conveniens* in Jones Act cases.[13] Of course, whether or not it is appropriate to analogize from FELA to the Jones Act, *Mayfield* cannot save the result below because the Louisiana statute abolishes the *forum non conveniens* doctrine in *all* maritime cases, not just those arising under the Jones Act, LA. CODE CIV. PROC. ANN. art. 123(C), and the plaintiff here has claimed under both the Jones Act *and the general maritime law*. Brief for the United States

[12] Only maritime litigants are deprived of the *forum non conveniens* doctrine incorporated in the Lousiana statute.

[13] The relevant portion of the Jones Act states only:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. App. § 688. That the Jones Act bestows on seaman, in addition to their general maritime law, the supplementary rights and remedies conferred by "statutes of the United States" on railway employees in no way supports the argument that FELA-generated law should substituted for the law which has been established over the years specifically for Jones Act and general maritime law cases.



as *Amicus Curiae* at 3. Neither *Mayfield* nor any other precedent substitutes decisions interpreting FELA for well-established rules in a body of law which preexisted FELA by centuries, and in which the need for national uniformity is constitutionally established.

That the Louisiana statute purports to preclude the application of the *forum non conveniens* doctrine to *all* maritime cases, not just Jones Act claims, also renders *Bainbridge* inapplicable. *Bainbridge* is an exercise in statutory interpretation, *see generally* 287 U.S. 278, and its limited endorsement of state venue provisions to Jones Act cases brought in state courts cannot be extended to cases involving general maritime law. Even if such extension were proper, *forum non conveniens* involves the much wider issue of *whether* the case should remain in the state in which it is brought, not which county of the state would be the venue. Because *Bainbridge* did not involve *forum non conveniens*, nothing in the decision suggests that states are free to withhold application of the doctrine in Jones Act suits. In fact, Jones Act cases may be the context in which the doctrine is most frequently invoked.

The applicability and outcome of a *forum non conveniens* analysis has a profound effect on maritime litigants: costs and availability of proof and witnesses will certainly vary, and there is a risk that even the substantive law applied may vary,[14] according to the forum in which proceedings go forward. Characterization of the doctrine as "procedural" cannot avoid its application because this Court has correctly refused to allow such epithets to control and because *forum non conveniens* is a characteristic feature of maritime law which must be given effect in all maritime cases regardless of its identification.

[14] *See* n.10, *supra* at 7.

## V

## ALTHOUGH THE INSTANT CASE INVOLVES UNITED STATES LITIGANTS AND FORA, ITS PRECEDENTIAL EFFECT IS INTERNATIONAL.

Issues involving the maritime jurisdiction are never bounded by any State, and while in the instant case, the appropriate alternative forum is Pennsylvania, the parties to the suit could as easily have been from Transylvania as Pennsylvania or Mississippi. The Louisiana statute does not restrict its own application to claims arising between American citizens, and if the decision below is permitted to stand, it would affect maritime defendants all over the world. Indeed, a foreign claimant asserting a claim against a Seattle-based U.S. defendant in the Louisiana state courts would be able to exert more pressure on his opponent than an American claimant who brought suit against foreign interests in a United States District Court in Louisiana. Such scenarios accord with neither the uniformity doctrine, nor the fairness litigants should be able to expect from our court system.

Foreign maritime interests are as much affected by the outcome of this case as any U.S. maritime litigants because a ruling on maritime matters affects everyone who participates in any fashion in maritime activities. The Court's recent decision in *Sisson v. Ruby*, 497 U.S. 358 (1990), teaches that the local flavor of the facts of a case does not override the national character of the jurisdiction, and that the precedents arising in one maritime context are applicable to all cases within the admiralty jurisdiction.



## VI

## THIS COURT SHOULD NOT ENDORSE FORUM SHOPPING.

The difference in availability of the *forum non conveniens* doctrine in state and federal courts encourages forum shopping of the rankest order with the result of burdening the defendant with the unwarranted additional litigation costs caused by having to litigate in a distant forum, even though a more convenient and appropriate forum is available. Such practices are particularly unacceptable in an area in which uniformity should reign. This Court should not sanction such abuses of a system that was constitutionally designed to promote fairness to all litigants by avoiding local variations in their rights.

## CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Louisiana Supreme Court.

Dated: June 17, 1993

Respectfully submitted,

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## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On June 17, 1993, I served the within *Amicus Curiae* Brief in Support of the Petitioner in re: "American Dredging Company v. William Robert Miller" in the United States Supreme Court, October Term 1992, No. 91-1950, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 17, 1993 at New York, New York.

LIZABETH L. BURRELL
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